Kluwer Competition Law Blog

# Greenwashing in Canada: What You Need to Know About the New Provisions, Initial Guidance, and the Ongoing Public Consultation

Anita Banicevic, Mark Katz, Teraleigh Stevenson (Davies Ward Phillips & Vineberg LLP, Canada) · Tuesday, February 4th, 2025

In June 2024, amendments to the Canadian *Competition Act* (**Act**) garnered significant attention (and often, 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 the business, business activities, products and/or services "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, and promised to develop guidance on "an accelerated basis" in consultation with stakeholders. While the Bureau quickly announced an initial public consultation and guidance on the Bureau's enforcement approach to environmental claims generally, the consultation materials and initial guidance did not engage substantively with the new provisions and largely restated high-level principles that are relevant to assessing any claim under the misleading representation provisions of the Act, providing little insight into how the Bureau would approach enforcement of the new provisions in particular.

In the closing days of 2024, the Bureau's long-awaited draft guidance on its approach to assessing environmental claims under the Act, including the new greenwashing provisions, was released for public consultation.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

We outline the new greenwashing provisions below, and unpack the key points that businesses making environmental claims in Canada need to know from the Bureau's draft guidance.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) and prohibits representations to the public in the form of statements, warranties or guarantees of a product's 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 generally, and has been the subject of consideration in Canadian case law (as discussed below).

2. The second provision applies to 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 claims 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 it clearly defined in legislative discussions regarding the amendments. As a result, this provision has generated significant uncertainty for businesses operating in Canada.

Prior to the introduction of these "greenwashing" provisions, businesses making representations about the environmental impacts of their products or services were required to comply with the general misleading representation provisions of the Act. However, the greenwashing provisions do expand the requirements of those general provisions by (i) specifically encompassing representations about businesses and their business activities; and (ii) requiring substantiation in accordance with internationally recognized methodology for certain environmental claims.

*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, the Bureau will be the only party that 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:

- Cease the impugned conduct;
- Pay an administrative monetary penalty of up to the greater of: (i) C$10 million (or C$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, three percent of the business's global gross annual revenues;
- Pay restitution to affected customers; and
- 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 article, we highlight key points from the Bureau's guidance to-date, which 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; this volume focuses on the Bureau's general approach to environmental claims under the Act.

As noted above, the initial public consultation was intended to inform the Bureau's future 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 Bureau's Digest, released contemporaneously with the announcement of the initial public consultation, are worth highlighting as "foundational" guidance on making environmental claims in Canada:

The Digest sets out the most common categories of environmental claims that are the subject of complaints to the Bureau, namely:

1. claims about the composition of products/packaging (*e.g.*, made from 100% recycled paper);
2. claims about the steps or resources involved in a production process (*e.g.*, carbon neutral production process);
3. claims about disposal of products after use (*e.g.*, recyclable);
4. comparison claims (*e.g.*, uses 25% less water);
5. vague claims (*e.g.*, eco-friendly); and
6. 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 businesses total operations).

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

The Digest offers high-level guidance for environmental claims, including:

1. 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;
2. for performance claims, ensure there is adequate and proper testing in support of the claim that is completed before the claim is made;
3. be specific about any comparisons;
4. 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");
5. avoid vague environmental claims in favour of clear specific ones; and
6. exercise caution when making future-looking claims to ensure they are factual rather than aspirational.

These guidelines parallel concerns raised in the common categories of environmental claims that are the subject of complaints. Notably, these principles would apply equally to the assessment of non-environmental claims under the deceptive marketing provisions.

While this guidance is not truly "new", it is helpful to keep these high-level principles in mind when assessing environmental claims to Canadian consumers.

**Ongoing Public Consultation and 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) directly 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 Act's misleading representation provisions, including the greenwashing provisions, is on representations made in marketing and promotional representations, "rather than representations made exclusively for a different purposes, such as to investors and shareholders in the context of securities filings". The draft guidance does note that if representations made in securities filings are repeated in promotional materials, they will be considered marketing representations. Nonetheless, the clarification is likely to provide some comfort to businesses operating in Canada, as many had raised concerns that the expansion of the greenwashing provisions to explicitly capture claims about businesses and business activities could capture (in some cases, mandatory) disclosure in securities filings.

With respect to the new greenwashing provisions in particular:

1. The draft guidance confirms that 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 intended claim and the appropriate testing procedure.
2. The draft guidance states that 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 expressly provides that a methodology developed by an industry and recognized in two or more countries may meet the requirement, provided that substantiation through the methodology is adequate and proper.
3. The draft guidance states that testing and third party verification will not be required to meet the requirement of substantiation in accordance with internationally recognized methodologies, unless the methodology requires testing and/or verification. However, the guidance does note that third party verification may nonetheless be helpful to improve the credibility of claims.
4. The draft guidance states that 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, businesses will still need to confirm that such methodologies are internationally recognized and provide for adequate and proper substantiation suitable for the claim. Arguably, this approach is inconsistent with the Senate Committee's report on the amendments, which provided that "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". It will be interesting to see if this point is revised following public consultation.

While these clarifications are generally helpful, it is disappointing to see the Bureau has not provided detailed guidance for specific types of claims in this area, particularly in light of the indications from businesses in Canada that the provisions have created significant uncertainty.

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 in Canada. This focus has been bolstered by advocacy from environmental groups, which have frequently brought complaints to the Bureau and thereby triggered investigations into alleged greenwashing by businesses advertising in Canada.

With the forthcoming extension of private rights of action to the misleading representation provisions, including the greenwashing provisions, we expect to see even greater scrutiny of environmental claims. While the Bureau's draft guidance therefore provides some welcome clarification for businesses in Canada, it is worth noting that this guidance may not be binding on private plaintiffs. Accordingly, for businesses in Canada, environmental claims (for now) should be made with caution.

---





This entry was posted on Tuesday, February 4th, 2025 at 10:10 am and is filed under Canada, Competition policy, Sustainability
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.