

Bill C-59's Expansion Of The Competition Act's Deceptive Marketing Practices: "Greenwashing" And Steering Clear Of Environmental Misrepresentation



On June 20, 2024, Bill C-59 received Royal Assent. Bill C-59 introduced a third round of amendments to the *Competition Act* in a two-year period, which altogether have fundamentally transformed the approach to competition law in Canada. McMillan has summarized these amendments in a series of bulletins, including a bulletin summarizing Bill C-59.¹

This bulletin provides a summary of Bill C-59's amendments to the deceptive marketing practices provisions in the *Competition Act* with respect to representations of benefits to the environment, including the potential impact on businesses and their statements to the public. These amendments, which arrive in light of the recent statement by the Commissioner of Competition (Commissioner) in the 2024 – 2025 Annual Plan of the Competition Bureau's intent to "[c]ontinue to crack down on deceptive marketing practices in relation to environmental claims ("greenwashing")",² have been subject to criticism from businesses and industry

associations.

Deceptive Marketing Practices

General

The deceptive marketing practices provisions in the *Competition Act* provide that a business is engaged in reviewable conduct, if, amongst other things, such business, for the purpose of promoting the supply or use of a product (which includes a service) or a business interest:

- i. makes a representation that is false or misleading in a material respect (s. 74.01(1)(a)); or
- ii. makes a representation in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product, that is not based on an “adequate and proper test”, the proof of which lies with the business (s. 74.01(1)(b)).³

Upon a finding that a business has engaged in deceptive marketing, the court may order, amongst other things, the business pay a civil administrative monetary penalty up to the greater of three times the value of the benefit derived from the deceptive conduct, or, if that amount cannot be reasonably determined, 3% of the business’s annual worldwide gross revenue.

Amendments to the Deceptive Marketing Practices Provisions – Environmental Representations

Bill C-59 expands the scope of civil deceptive marketing practices provisions through the addition of two new provisions that address representations made in respect of the environment.

1. Performance, efficacy or length of life of a product/service – Environmental Representations (section 74.01(1)(b.1))

The first new provision simply duplicates the language of the current paragraph 74.01(1)(b) that requires a business to be able to demonstrate that a representation regarding the performance, efficacy or length of life of a product is based on an “adequate and proper test.” This amendment specifically applies to representations made in respect of a “product’s benefits for protecting or restoring the environment or mitigating the environmental social and ecological causes or end effects of climate change.” Arguably, this amendment does not significantly change the scope of liability for businesses, but rather clarifies that statements regarding environmental benefits of products must be substantiated by businesses based on an adequate and proper test, in the same manner that product performance claims must be substantiated. Many environmental claims are not claims of performance or efficacy, so are not subject to the pre-existing requirements of subsection 74.01(1)(b).

2. Business or business activity – Environmental Representations (section 74.01(1)(b.2))

The second new provision, however, significantly expands the current deceptive marketing provisions by requiring a business that makes a representation “with respect 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” to be able to establish that such representation is based on “an adequate and proper substantiation in accordance with internationally recognized methodology”.

This new provision extends the application of the deceptive marketing provisions beyond claims related to a “product” (e.g., the environmental benefits of a product offered to

consumers), to claims related to a “business or business activity.”

It is not a defence that the environmental representation is truthful, and not false or misleading. Instead, a claim of environmental benefits will be found to be deceptive marketing under this new provision if a business cannot establish that such claim is based on “an adequate and proper substantiation in accordance with internationally recognized methodology.”

As background, this new provision was included in Bill C-59 only recently on May 2, 2024, and appears to be based on a letter from the Commissioner to the House of Commons Standing Committee dated March 1, 2024.^{4, 5} As noted by the Commissioner in his letter, while certain environmental claims may already be subject to review under the core misleading representation provisions in section 74.01(a), “it can be challenging for the Bureau to prove that they [environmental claims] are false or misleading in a material respect.”⁶ Accordingly, the Commissioner recommended “studying whether the reverse onus approach to greenwashing claims could eventually be expanded to require that all environmental claims made to promote a product or business interest be supported by adequate and proper substantiation.”

Insight to the possible breadth of the application is evident from the Commissioner’s submission letter, which observes that a significant portion of the greenwashing complaints the Bureau receives involve “*general or forward-looking environmental claims about a business or brand as a whole (e.g. claims about being “net zero” or “carbon neutral by 2030”)*”.⁷

In addition, the phrases “adequate and proper substantiation” and “internationally recognized methodology” are new terms that are not defined in the *Competition Act* and have not been considered by the courts. Hence, their meanings are uncertain

at this time. This lack of certainty is complicated by the fact that the legal framework and industry best practices regarding environmental practices continue to develop (i.e., it is not clear the standard to assess whether a substantiation process is “internationally recognized methodology”) and that the statements are not limited to those contained in marketing campaigns, and may apply to statements to the public made by a business in accordance with other regulatory regimes (such as securities laws, industry specific regulations, etc.).

Private Right of Action – Deceptive Marketing – Environmental Claims

Historically, the Commissioner has been the only party that could file an application seeking an order against a business allegedly engaged in a deceptive marketing practices under the *Competition Act*.⁸ However, Bill C-59 amended the *Competition Act* to provide that private parties may, as of June 20, 2025, directly file applications with the Competition Tribunal (with leave from the Tribunal, based on a public interest test) seeking an order under the civil deceptive marketing practices provisions.

Non-governmental and not-for-profit groups with environmental mandates, amongst others, will very likely make use of this new private right of enforcement. While they cannot commence such proceedings until June 2025, there is a one-year limitation period for such matters, so any “representations to the public” made from June 20, 2024, are potential targets for such private proceedings.

Competition Bureau Guidelines

On July 4, 2024, the Competition Bureau advised that it will launch a public consultation – on an accelerated basis – to develop guidelines to assist businesses comply with these

greenwashing amendments. The Bureau has already posted a “Guidance Feedback Form” to allow parties to directly provide comments to the Bureau.⁹

These guidelines are critical, given the uncertainty of the application and standards of the new environmental claims provisions, the lack of transition period after the date of Royal Assent to allow businesses to consider how best to adapt to this new law. Notwithstanding the desired clarity to be provided by any guidelines, these guidelines will only be indicative of the Bureau’s planned approach to assessing environmental claims, and will not be binding on the Bureau, let alone the courts (including the Competition Tribunal) or private parties seeking to take action against business under these new provisions. Accordingly, an element of uncertainty will remain until case law has been developed.

Next Steps

We will provide further updates as matters develop, including once the Bureau issues proposed compliance guidelines.

The new provisions are complex and uncertain, and failure to comply with these provisions may have a significant impact on businesses. Accordingly, to identify potential concerns and mitigate liability under these new provisions, businesses should assess and potentially modify their existing environmental statements and establish processes to be followed when making new environmental statements.

To understand how the deceptive marketing provisions, including in particular these new greenwashing provisions, may impact your business or to assist with any questions you may have about Canada’s changing competition law landscape, please reach out to McMillan’s Competition and Antitrust Group.

Footnotes

1. Please see our bulletins summarizing the competition law amendments in Bill C-59: McMillan LLP, [Ready for Change? Bill C-59 Rewrites the Competition Playbook – McMillan LLP](#).

2. See the Commissioner's [2024-2025 Annual Plan – Onwards and upwards – Strengthening competition for Canadians](#).

3. The Commissioner may challenge alleged misrepresentations under the civil regime (section 74.01(1)) or the criminal regime (section 52(1)), with principal difference between the civil and criminal provisions being the requirement than the business engaged in such false or misleading representation, “knowingly or recklessly”. The Commissioner has advised that he will pursue a matter under the criminal provisions “if there is clear and compelling evidence that the conduct was engaged in knowingly or recklessly.

It is significant to note that the Commissioner recommended the amendments set forth in new paragraph 74.01(1)(b.2) (Online [here](#)) and, in fact, quoted a submission by Ecojustice and Canadian Association of Physicians for the Environment that: misleading advertising claims should “... [b]e extended to apply to non-product statements, like a company’s net zero commitments and plans. These types of commitments and plans should be supported with modeling...” (Online [here](#)).

4. The Commissioner had not recommended expanding the deceptive marketing provisions to specifically include environmental representations in his initial submission – The Future of Competition Policy in Canada – in response to the Government of Canada’s consultation and discussion paper on the Future of Competition Policy in Canada. (Online [here](#)).

5. See the [Commissioner’s March 1, 2024 submission letter](#).

6. As noted by the Commissioner in his March 1, 2024 letter, the claims subject to review under the then current false and misleading provision are not subject to a reverse onus obligation, and “it can be challenging for the Bureau to prove that they are false or misleading in a material respect.

7. When advocating for the expansion of the provisions to include this new amendment in the March 1, 2024 submission letter, the Commissioner referred

to public comments received from EcoJustice & and Canadian Association of Physicians for the Environment, which had stated: *"The provision should... [b]e extended to apply to non-product statements, like a company's net zero commitments and plans. These types of commitments and plans should be supported with modeling..."* (Ecojustice and Canadian Association of Physicians for the Environment, Dec. 1, 2023). See also comments submitted by Ecojustice and the Canadian Association of Physicians for the Environment in March 2023: (Online [here](#)).

8. While private parties have, for many years, had the ability to sue advertisers for misleading advertising, those claims relied on findings of causation and proof of harm or loss on the part of the plaintiff. This is generally difficult in advertising cases.

9. See "[Competition Bureau statement regarding guidance on Competition Act's new greenwashing provisions](#)".

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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