Canada's New Greenwashing Laws Enacted

On June 20, the federal government passed amendments to the *Competition Act* (Act) that target "greenwashing" (i.e., making untested or unsubstantiated claims about the environmental benefits of a product or business). These amendments create substantial uncertainty, risks and potential liability for businesses, which could undermine the environmental initiatives of Canadian corporations. In the wake of the amendments, businesses should urgently review their existing public representations and implement strict compliance programs to minimize the risk of attracting enforcement action or becoming a target of private greenwashing litigation.

The greenwashing changes were contained in Bill C-59, omnibus legislation that implemented a variety of amendments by the federal government arising from its Fall Economic Statement released in November 2023. For further information on the sweeping changes to the Act contained in Bill C-59, see our June 2024 bulletin *Canadian Competition Law Changes Now in Force*. To see our collection of Insights covering all the recent amendments to the Act, visit the *Blakes Competition Act Amendments* page.

New Greenwashing Provisions

The "greenwashing" amendments prohibit representations to the public for the purposes of, directly or indirectly, promoting

the supply or use of a product or any business interest:

1. In the form of a **statement, warranty or guarantee of a product's benefits** for protecting or restoring the environment or mitigating the environmental, social and ecological causes or effects of climate change **that is not based on an adequate and proper test**, the proof of which lies on the person making the representation (the "Product Benefit" provision), or
2. **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 **that is not based on adequate and proper substantiation in accordance with internationally recognized methodology**, the proof of which lies on the person making the representation (the "Business Activity" provision)

Practical Considerations

Notwithstanding their potential overlap in some circumstances, these amendments create distinct prohibitions with key differences that businesses should consider.

The Product Benefit provision would capture specific claims with respect to the resources used to manufacture a product or the emissions saved by a product's manufacture or use. Until guidance on the Product Benefit provision is released, it would be prudent to follow the Competition Bureau's (Bureau) recommendations for conducting "adequate and proper" testing to support performance claims based on existing jurisprudence. These recommendations include:

- Conducting the testing before making the claims
- Testing under controlled circumstances to eliminate external variables
- Eliminating subjectivity as much as possible
- Reflecting the real-world usage of a product (such as

in-home or outdoor use)

While the testing requirement under the Product Benefit provision is based on the Act's existing performance claims provision, the Business Activity provision creates a "substantiation" requirement for which there is no existing analog in the Act. In the past, the onus has been on the Bureau to prove that claims are misleading. Under the new greenwashing provisions, however, companies now bear the onus of proving that representations are not misleading, either by showing that they are based on an adequate and proper test (for Product Benefit claims) or by showing that they have been properly substantiated (for Business Activity claims). This appears to place the onus on companies to prove that claims about their organization's goals or achievements regarding carbon neutrality, emissions and emissions intensity are not misleading. The new and undefined standard requiring businesses to base representations on "adequate and proper substantiation in accordance with internationally recognized methodology" creates significant uncertainty for businesses because the specific meaning of "substantiation" and "methodology" is unclear. Absent guidance from the Bureau (and eventually the Competition Tribunal (Tribunal)) regarding how this provision will be applied, businesses should base Business Activity claims on best practices endorsed by reputable international bodies wherever possible.

While generic statements that imply environmental friendliness, such as a product or business being "green" or "eco-friendly," may not be caught by either the Product Benefit or Business Activity provisions, it is unclear how the Bureau (and the Tribunal) will apply these provisions. Accordingly, all environment-related representations should be carefully reviewed, keeping in mind both the greenwashing amendments as well as the general prohibitions on deceptive marketing in the Act and other legislation (such as provincial consumer protection laws) that may be applicable.

Increased Enforcement and Private Litigation Risks

Penalties for making statements that amount to "greenwashing" under the new provisions can be severe. These can include an administrative monetary penalty that is the greater of:

1. C$10-million (C$15-million for repeat conduct), and
2. Three times the value of the benefit derived from the deceptive conduct, or, if that amount cannot be reasonably determined, 3% of worldwide gross revenues

Moreover, while only the Bureau can currently bring cases concerning these new provisions, starting in June 2025, private parties will be able to seek leave from the Tribunal to commence proceedings, with the only requirement for standing being that the proceedings are in the "public interest." In addition to the above administrative monetary penalties, payment of restitution to customers could be ordered if the conduct also contravenes the Act's existing general deceptive marketing provision. Following the significant volume of "greenwashing" complaints made to the Bureau in recent years, companies making environmental claims should expect private parties, including public interest groups, to use this new private right of access to bring claims alleging greenwashing.

Unintended Consequences: Greenhushing

When combined with competing pressures to make environmental representations from stakeholders and regulators, the broad scope and ambiguous requirements of the new greenwashing laws create enhanced compliance risks for Canadian businesses. Companies operating in industries historically targeted by environmental groups face higher risks of enforcement action, notably by private litigants starting in June 2025. This increased risk may undermine not only companies' abilities to communicate about their environmental initiatives and

commitments but potentially also the initiatives and commitments themselves.

Key Takeaways

In summary, the new greenwashing amendments will affect businesses in at least the following ways:

1. Claims about a product's environmental benefits need to be supported by adequate and proper testing.
2. Claims about a business or business activity's environmental benefits need to be substantiated in accordance with "internationally recognized methodology," an undefined term for which there is currently no Bureau guidance.
3. Penalties for contravening the new greenwashing provisions can be significant and, beginning in June 2025, can be sought by private parties with leave from the Tribunal.

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