

Canada's Push-Back On Greenwashing: Amendments To The Competition Act



As the global climate change crisis becomes more evident, and society grows more concerned about the sustainability of the products they are buying, companies are adapting to the growing environmental conscientiousness of their consumers. However, while many companies have recognized the market potential of participating in the green economy, not every company is equally transparent and honest about their efforts and commitment to the health of the environment. Moreover, without clear market expectations governing the claims companies can make about the sustainability and environmental attributes of their business and products, some companies have been able to realize a market advantage by making such claims without making corresponding changes and investments in their business practices. As a result, it is difficult for consumers and investors to separate substantiated and unsubstantiated environmental claims to make informed decisions about the environmental impact of the products they purchase and the businesses they support.

It is within this context that policy makers in Canada have taken action to develop standards applicable to the claims companies can make about the sustainability and environmental attributes of their business and products. Amendments to Part VII.1 of the *Competition Act* (Canada) (the “Act”) governing deceptive marketing practices, originally introduced by Bill

C-59, came into effect on June 20, 2024. These amendments address the market and competitive harm caused by what is colloquially referred to as 'greenwashing' (the "Greenwashing Amendments"). Greenwashing refers to the use of misleading, untrue, or unsupported statements about a product or a company's environmental or climate benefits, which may be in the form of commercials and advertisements or on product labels. Beyond the harm caused by deceptive marketing, greenwashing presents a significant barrier in the transition to a sustainable and environmentally friendly economy.

What are the Greenwashing Amendments?

The Greenwashing Amendments amend the language to the already existing Deceptive Marketing Practices part of the Act, specifically section 74.01 addressing misrepresentations to the public. This section previously addressed the issues of when misrepresentations were made to the public about the performance, efficacy or length of life of a product. It now also covers (a) misrepresentations made about a product's environmental benefits and (b) misrepresentations regarding a business and its activities in relation to the protection of the environment or the mitigation of environmental and ecological effects of climate change.

These amendments require businesses who make such representations to base their statements on an "adequate and proper test" for their products and to adhere to internationally recognized methodology to substantiate representations about their business and business activities. The burden of proof is placed on the business making environmental representations, and companies making misrepresentations may be subject to punitive penalties. Therefore, it is important for organizations to understand how to comply with these new requirements.

Compliance Considerations: Unpacking the requirements

Compliance with the Greenwashing Amendments requires the same process and controls applicable to other regulatory compliance obligations facing a company. A company must (a) understand the regulatory requirements, (b) audit and assess their practices for compliance with the regulatory requirements and make adjustments where required, (c) adopt internal controls to ensure compliance with the regulatory requirements, and (d) monitor compliance on an ongoing basis.

To understand the regulatory requirements, a company must recognize what substantiates an “adequate and proper test” in relation to representations about a product. Section 74.01 of the Act already required other types of product representations to be backed by an appropriate test, so guidance can be taken from factors the Competition Bureau takes into account related to performance, efficacy, and length of life of a product. To be considered adequate and proper the test must:

1. be conducted BEFORE the claims are made;
2. be carried out under controlled circumstances to eliminate external variables;
3. eliminate subjectivity as much as possible;
4. reflect the real-world usage of a product (such as in-home or outdoor use);
5. support the general impression created by the marketing claims; and
6. establish that the results are not mere chance, or a one-time effect.

The Competition Bureau will assess environmental representations not only by their literal meaning but also the general impression that is conveyed to consumers. This is done by considering the entire form of representation, from the words and graphic elements to the overall layout of the

representations about the product or business activity.

The Competition Bureau has released Volume 7 of The Deceptive Marketing Practices Digest, which provides some guidance for businesses on how to properly and honestly market their environmental claims. Therein, the Competition Bureau categorizes the following types of complaints it commonly receives alleging greenwashing:

- (a) product or package composition claims
- (b) production process of products claims
- (c) product disposal (e.g. compostable or recyclable) claims
- (d) comparative environmental claims (to a prior version or a competitor)
- (e) vague “environmental” or “eco-friendly” claims
- (f) claims about future environmental improvements and performance

Further, within the Digest, the Competition Bureau provides the following general guidance for businesses making environmental claims:

- (a) be truthful, and not false or misleading
- (b) ensure claims are properly and adequately tested
- (c) be specific about what is being compared when making comparative claims
- (d) avoid exaggeration
- (e) avoid vague environmental claims in favour of clear and specific ones
- (f) avoid aspirational claims about the future

What does it mean for a company to adhere to internationally

recognized methodology to substantiate representations about its business and business activities? As of now, the Competition Bureau has not provided strict guidance as to what evidence is necessary to satisfy the burden of proof on claims about businesses and business activities. However, the Competition Bureau has acknowledged the call for additional guidance. To this end, the Competition Bureau has launched a consultation process, inviting interested parties to provide feedback on the [consultation questions](#) by September 27, 2024.

Until definitive guidance from the Competition Bureau is released, businesses can look to examples in the international context on how to demonstrate the truth behind these kinds of representations. The United Nations standards are vital to understand and consider as the United Nations Environment Assembly (UNEA) sets the global environmental agenda, provides overarching policy guidance, and defines policy responses to address emerging environmental challenges. Companies can also turn to the International Organization for Standardization (ISO), for guidance, including ISO 14001, which is an internationally recognized standard for environmental management systems. The EU also has multiple directives establishing anti-greenwashing laws and is a leader in eco-friendly and environmentally focused practices.

Responding to arguments against the Greenwashing Amendments

Many voices have been raised in protest to the passing of the Greenwashing Amendments, calling them “vague” and “subjective” and stating that companies “will be intimidated from making any environmental claims” (see, for example, [Government of Saskatchewan](#)). It has also been said that the Greenwashing Amendments will “create chaos and uncertainty” within the energy industry (see, for example, the [Government](#) of Alberta). Both the Saskatchewan and Alberta governments are taking these positions on behalf of the strong oil and gas industries in

their provinces. In reality, the provisions require objectivity in evaluating environmental representations, so the only companies that should be intimidated or feel uncertain are those making false claims about their environmental records.

Another argument against these provisions is that they implement a “gag law”; however, there are no restrictions in the Greenwashing Amendments on the fundamental freedoms of thought, belief, opinion, and expression guaranteed in Section 2 of the Charter. In fact, Parliament built in enough flexibility to allow advertisers to design their own performance representations, so long as they can provide sufficient evidence to substantiate their claims.

The Greenwashing Amendments have also been presumed to pose “unnecessary and excessive risks to Saskatchewan businesses” (see [Government of Saskatchewan](#)), and there is worry that it will “stifle many billions in investments in emissions reducing technologies” (see [Alberta Government](#)). On the contrary, the objectivity introduced by the Greenwashing Amendments can increase investor confidence and serve to attract capital to Canada in support of businesses participating in the energy transition and green economy. The Greenwashing Amendments will ensure that businesses that have invested in operating sustainably with positive environmental records will be able to realize a competitive advantage over businesses that have made false claims without the corresponding investment, time, and effort required for real positive impact. Investors who are dedicated to sustainability will be drawn to companies committed to these endeavors and able to substantiate their representations, providing an important incentive for all businesses to make real investments to improve their environmental performance.

Procido’s [Governance Group](#) has experience with *Competition Act* and environmental issues, together with core governance advice, and is available to help with navigating compliance

with the Greenwashing Amendments.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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