Clearing The Air: Canada Adopts New Greenwashing Laws Under The Competition Act

New amendments to the *Competition Act* in Canada are now in force via Bill C-59 after receiving royal assent on June 20, 2024. Many of these amendments target "greenwashing" – a common shorthand for misleading environmental claims about products or business practices.

In Canada, greenwashing has been regulated primarily as a form of deceptive marketing, recognized as anti-competitive conduct. As a result, regulatory oversight over greenwashing has come under the purview of Competition Bureau Canada (the "Competition Bureau"). The new amendments to the *Competition Act* introduce a more targeted prohibition against greenwashing, and expand the means of enforcement as follows:

First, Bill C-59 introduces explicit prohibitions against deceptive environmental claims, requiring that such claims be based on "adequate and proper tests" or "internationally recognized methodologies." While this clarifies that environmental claims must be supported by "adequate and proper" testing, there continues to be some ambiguity with respect to these standards, although the Competition Bureau is actively monitoring parallel guidance in the United States and the European Union, where new directives and updates are also underway to standardize environmental claims.

While it assesses these developments, it remains to be seen whether the Competition Bureau will issue its own specific guidance on what constitutes adequate and proper tests and internationally recognized methodologies.

Second, Bill C-59 expands the private rights of action available under the Act, allowing private parties to bring greenwashing claims before the Competition Tribunal more easily by broadening the criteria for granting leave. Effective June 2025, private actions can be based on claims made as of June 20, 2024. The introduction of a "public interest" criterion is expected to increase the number of greenwashing claims brought by environmental groups, competitors, and consumers – potentially via a form of class action.

Third, Bill C-59 introduces a certification regime to protect environmental collaborations from legal challenges, provided these agreements do not substantially prevent or lessen competition.

These amendments are summarized below.

1. **Civil prohibition against greenwashing**

Prior to Bill C-59, subsection 74.01(1) of the *Competition Act*, created a civil prohibition against deceptive marketing that allows the Bureau or private litigants to seek redress for a "representation to the public that is false or misleading in a material respect." While paragraph 74.01(1)(a) indirectly captured greenwashing claims that are false or misleading, the new amendments explicitly prohibit deceptive environmental claims by forbidding:

- Claims that promote the environmental, social and ecological benefits of using or supplying a product if the claim is not based on an adequate and proper test (Section 74.01(1)(b.1).
- Claims that promote the environmental and ecological

benefits of a business or business activity that are not based on adequate and proper substantiation in accordance with internationally recognized methodology (Section 74.01(1)(b.2)).

The terms “adequate and proper test” and “internationally recognized methodology” are not defined terms under the *Competition Act*.

While under the Act prior to Bill C-59, an “adequate and proper” test was required for claims as to the “performance, efficacy or length of life of a product,” the amendments under Bill C-59 apply this standard to environmental claims as well. New is the requirement that the substantiation be “in accordance with internationally recognized methodology.” Various international, national and sub-national standards exist, with some being voluntary. It is unclear which of these standards would be the relevant point(s) of consideration, and also by *whom* outside of Canada they must be recognized.

The “Environmental Claims: A Guide for Industry and Advertisers” (“Environmental Claims Guide”), which was jointly released by the Competition Bureau and the Canadian Standards Association in 2008, was archived in 2021, as the Competition Bureau considered its content outdated after more than 12 years in use. Since archiving its guide, the Competition Bureau is actively exploring options and monitoring parallel guidance developments internationally.

For instance, the European Parliament adopted the Green Claims Directive on March 12, 2024, which provides guidelines and minimum criteria required to substantiate environmental claims as well as an updated eco-labeling scheme. If the European Parliament and Council of the European Union reach an agreement, EU Member States will be required to implement the directive into national law within 24 months and proceed to apply the measures within 36 months.

Similarly, the United States Federal Trade Commission is currently conducting a review and update of its Green Guides, which is scheduled for release in 2024, which provide guidance on how brands can make credible environmental marketing claims about their products. The Green Guides were first issued in 1992 and were revised in 1996, 1998 and 2012.

Additionally, various domestic and international standards are in development to define and verify environmental claims, alongside industry-specific best practices in sectors like finance, food and beverage, textile, and construction. Businesses should engage with these evolving standards through regular updates and internal audits to maintain compliance with this evolving landscape.

1. **Expanded private rights of action**

Bill C-59 introduces changes that will expand access and ease the legal test that would allow private parties to bring greenwashing claims before the Competition Tribunal, effective June 2025.

Prior to Bill C-59, private litigants were required to show that their business was "directly and substantially" affected by the alleged conduct to obtain leave to bring a private action before the Tribunal. The amendments in Bill C-59 broaden the criteria for the Tribunal to grant leave, allowing private actions where:

- Only part of the applicant's business is substantially affected.
- The Tribunal is satisfied that it is in the "public interest" to grant leave.

The introduction of a "public interest" criterion is expected to lead to an increase in claims, particularly greenwashing claims, before the Tribunal. Environmental groups, competitors and even consumers are more likely to challenge businesses that make questionable or exaggerated environmental claims.

Such a claim may result in an order that the business pay an amount not exceeding the value of the benefit derived from the conduct that is the subject of the order. This amount is to be distributed among the applicant and "any other person affected by the conduct," suggesting a form of class action without the formal certification process.

While private rights of action have been deferred for one year, the amendments permit private actions relating to claims made (or continuing to be made) as of June 20, 2024. This will require proactive compliance measures and strategic planning to mitigate potential challenges.

1. **Clearance for environmental collaboration**

Bill C-59 also introduces a new certification regime aimed at protecting environmental collaborations from legal challenges under the Competition Act. The amendments offer immunity from criminal conspiracy and civil competitor collaboration provisions of the *Competition Act*, provided these agreements do not substantially prevent or lessen competition. It is important to note that certificates do not provide immunity for abuse of dominance provisions under the Act.

The new certification mechanism under section 124.3, empowers the Commissioner of Competition to certify certain environment-related agreements. This certification exempts the parties involved from the criminal and civil competitor collaboration provisions under the Act, if the following conditions are met:

- The agreement or arrangement proposed by a party or parties is intended to protect the environment.
- The agreement is unlikely to substantially prevent or lessen competition in a market.

Certificates issued under this regime are valid for a period of 10 years. There is an option for extension upon request, allowing parties to continue to benefit from the immunity

provided.

Key takeaways

Although guidelines, voluntary codes of conduct and self-regulation procedures for environmental claims have existed for years within industries, the marked increase in greenwashing claims has necessitated updates to standards and guidelines.

In the absence of clear guidelines on what qualifies as an "internationally recognized methodology," and with expanded private access to the Competition Tribunal, green marketing in Canada may carry heightened risks, potentially leading to a chilling effect known as "greenhushing." Businesses are encouraged to conduct internal audits of their claims, including those on product packaging, advertisements and statements about their environmental practices, to ensure they are substantiated and aligned with international standards.

Navigating the complexities of greenwashing demands a robust strategy and meticulous attention to detail to mitigate reputational risks and potential legal liabilities. Ensuring the credibility and transparency of environmental claims, slogans and brands will be critical to maintaining consumer trust, as well as compliance with the new greenwashing provisions.

Read the original article on GowlingWLG.com

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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