

Competition Act And Environmental Claims Guidelines



On December 23, 2024, the Competition Bureau (the “Bureau”) released proposed guidelines (the “Proposed Guidelines”) that aim to clarify the Bureau’s enforcement approach and interpretation with respect to provisions of the *Competition Act* which apply to environmental and climate claims. The Proposed Guidelines were published in response to June 2024 amendments to the *Competition Act* that added new provisions dealing specifically with environmental claims. The Proposed Guidelines incorporate comments received during the first phase of public consultation that ran from July 22 to September 27, 2024. Publication of the Proposed Guidelines is the second stage of the Bureau’s public consultation process.

Although the Proposed Guidelines discuss both the general deceptive marketing provisions which existed prior to the June 2024 amendments to the *Competition Act* as well as the new environmental claims provisions, this note focuses on comments related to the new provisions.

Guidance in the Proposed Guidelines relating to the application of the general provisions to environmental claims closely mirrors guidance previously released by the Bureau in Volume 7 of the Deceptive Marketing Practices Digest, which is discussed in our previous [blog post](#).

Existing Interpretation Will Be Applied Where Possible

The Proposed Guidelines apply a contextual approach to the interpretation of the new environmental claims provisions. The new provisions included in the Act are as follows:

74.01(1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, and business interest, by any means whatever, ...

(b.1) makes a representation to the public 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;

(b.2) makes a representation to the public 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; or ...

Notably, the phrase "adequate and proper test" (among others) also appears in the existing marketing provisions of the Act (s. 74.01(1)(b)), which applies generally to statements regarding the performance, efficacy or length of life of a product (including in the context of environmental claims).

The Bureau explicitly states that the same interpretation and considerations previously set out by courts in the context of the general deceptive marketing provisions will also apply to the terms "adequate and proper" and "test" in respect of the

new provision 74.01(1)(b.1), as well as the term “adequate and proper” in respect of the new provision 74.01(1)(b.2). This means that testing or substantiation must be “fit, apt, suitable or as required by the circumstances”. The Bureau further explains that what qualifies as “adequate and proper” will depend on the overall impression a representation creates for consumers.

With respect to terms that have not yet been interpreted by the courts, but which have a clear ordinary meaning, the Bureau indicates that it will rely on this ordinary meaning until those terms are subject to interpretation in the courts. This guidance applies in respect of terms such as “climate change”, “environment”, “ecological”, and “business activity”.

Lack of Guidance With Respect to “Internationally Recognized Methodology”

One key aspect of s. 74.01(1)(b.2) that is new to the Act, and which was the subject of a significant number of public comments, is the phrase “substantiation in accordance with internationally recognized methodology”. While many submissions during the public comment period requested that the Bureau provide specific direction as to which methodologies would meet this standard, the Proposed Guidelines provide only general direction and leave it to businesses to determine.

First, the Bureau defines ‘substantiation’ as “establishing by proof or competent evidence” (but does not necessarily involve testing) and ‘methodology’ as “a procedure used to determine something”. The Proposed Guidelines go on to indicate that the Bureau will *likely* consider a methodology to be internationally recognized if it is “recognized in two or more countries”, although not necessarily by governments in those countries. The Bureau emphasizes that the chosen methodology must also be shown to be an “adequate and proper”

substantiation of the claim, as that term has been interpreted by prior jurisprudence.

Furthermore, the Proposed Guidelines draw a clear distinction between 'methodologies' and 'international standards', emphasizing that while international standards may contain or reflect internationally recognized methodologies, the two concepts are not the same. Businesses are not required to comply with an international standard, nor must they be members of a specific multistakeholder standards body, to substantiate environmental claims using internationally recognized methodologies.

Other Key Issues

The Proposed Guidelines discuss a number of additional key issues, including the following:

- **Use by a Canadian government does not mean a methodology is internationally recognized:** the Proposed Guidelines make clear that “while 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”, it is still up to businesses to exercise due diligence to ensure the methodology is internationally recognized and is suitable (“adequate and proper”) to support the particular claim. In other words, businesses must give consideration to the specific requirements under the Act, and may not be able to rely on methodologies that are required or accepted for compliance with other government programs to demonstrate “adequate and proper substantiation in accordance with internationally recognized methodology”.
- **Claims related to new climate technologies:** during the public comment period, many businesses raised concerns about how the new provisions would impact the ability to make environmental claims based on the use of new

climate technologies. There was a general concern that these types of environmental claims could be particularly subject to 'greenhushing' measures in light of the new provisions. The Proposed Guidelines highlight that the new regime is flexible such that, in the face of new technologies, a business maybe able to rely on multiple internationally recognized methodologies that are used to substantiate similar claims or that can be used together to substantiate the claim. However, the Bureau cautions that if a business concludes that there is no way to substantiate its claim, it should avoid making that claim.

- **Statements in regulatory filings are not the focus of the new provisions:** concerns were raised during the public consultation regarding the reach of the new provisions, including the application of these provisions to statements made in various regulatory filings such as securities filings, which are technically public. The Proposed Guidelines confirm that, regardless of whether regulatory filings could be captured under the deceptive marketing provisions of the Act, the Bureau is focused on marketing and/or promotional representations. However, if information in regulatory filings is used by businesses in promotional materials, the Proposed Guidelines are clear that the Bureau will consider the representations to be marketing representations.
- **Publication of substantiation/testing data is not required:** while it is required to be able to show adequate and proper substantiation of claims, the Proposed Guidelines clarify that supporting data or information does not need to be made public. However, making such materials public may mitigate the risk of enforcement actions being initiated (by either the Bureau or private parties).
- **Flexibility:** while many businesses show concern regarding the rigidity of the new regime and the impact

it will have on their ability to market their business, the Proposed Guidelines repeatedly highlight that there is some flexibility with respect to the new provisions. For example, the Proposed Guidelines do not specify any specific methodologies which businesses will have to use but rather only provide light guidance regarding the types of methodologies which may be appropriate. For instance, with respect to net-zero claims, the Proposed Guidelines state that “there are a number of different standards to help businesses learn how to meet the challenge of reaching net-zero”. The Proposed Guidelines also note that the Act does *not* require that “the internationally recognized methodology used to substantiate a claim must be the best methodology available”, but simply that it should be reputable and robust.

- **Applicable to businesses of all size:** during the public comment period, the Bureau received many comments in favour of an exemption for small businesses from the new environmental claims provisions of the *Competition Act*. The Proposed Guidelines highlight that it is the Bureau’s view, relying on existing case law, that businesses of all sizes are required to comply with the environmental claims provisions.
- **Forward looking claims and targets:** the Proposed Guidelines reinforce the Bureau’s focus on future claims and forward-looking targets and extrapolates on how they may be assessed under the general prohibition against false or misleading representations. Specifically, the Bureau states that companies making future-oriented claims must have a clear understanding of what needs to be done to achieve the stated objective, and develop a concrete, realistic, and verifiable plan with interim targets to accomplish the goal. They must also ensure that relevant steps are already underway to implement the plan. This supports the Bureau’s expected practice of seeking substantiation for both existing and forward

looking environmental claims and targets.

Guidelines Will Not Be Determinative

Finally, it is critical to keep in mind that while the Proposed Guidelines are intended to provide businesses with guidance only, they will not be binding or determinative. The Proposed Guidelines represent the Bureau's opinions with respect to the Act and, as such, will inform the Bureau's approach to its investigations and enforcement decisions. The Competition Tribunal ("Tribunal") is the legal body which will adjudicate on the actual application and interpretation of the Act, and the Tribunal is not bound by the Proposed Guidelines. However, the Tribunal does historically give some weight to Bureau guidelines, and as such, it may take the Proposed Guidelines into consideration when adjudicating on environmental claims matters.

Under the current iteration of the Act, businesses can still take some comfort from the Proposed Guidelines as the Bureau will generally follow the guidelines when determining whether an issue should be brought before the Tribunal. Once the private right of action under the *Competition Act* comes into force on June 20, 2025, following the Proposed Guidelines may become less likely to protect a business from the initiation of a greenwashing allegation as private applicants may bring actions based on their own interpretations of the Act. In fact, the Bureau explicitly states that the Proposed Guidelines are not law and only set out their perspective and interpretation of the provisions, not the perspectives of potential private applicants.

On the other hand, the Bureau is also clear that it will have regard to the Proposed Guidelines when deciding whether to intervene in a private application before the Tribunal, and the Tribunal may give consideration to the Proposed Guidelines when deciding whether to grant private parties leave to bring an action.

Conclusion

In many respects, the Proposed Guidelines do little more than confirm that previous interpretations by the Tribunal and courts of the general deceptive marketing provisions will apply to the new greenwashing provisions, to the extent they are relevant. Beyond this, the Proposed Guidelines provide little definitive guidance but rather reiterate that a business will be responsible for undertaking due diligence to determine what is required to align with the new provisions.

To derive as much protection from the Proposed Guidelines as possible, it would be pragmatic for a business to consider the following when preparing to make environmental claims public:

- When making claims in respect of business activities, document the due diligence you have undertaken to support your environmental claims, as well as your conclusion that any methodology used to substantiate claims relating to your business or business activities is internationally recognized.
- Care should be taken when making claims that relate to new or emerging technologies. Consider whether there is an existing test or internationally recognized methodology, as applicable, to support that claim.
- When considering making claims about future-oriented goals or targets, consider carefully whether you have adequate substantiation for that goal or target in the form of a concrete, realistic, and verifiable plan with interim targets to accomplish it. The plan does not need to be made public, necessarily, but does need to be available if that goal or target is challenged.

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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