# Prove It: Competition Act Amendments Require Companies To Back Up Environmental Claims

Bill C-59 amendments to the *Competition Act* (the Act) have created a new avenue to challenge companies' public statements on environmental protection and climate change mitigation. The amendments cover a broad range of representations, including those made in marketing and advertising, on websites and social media, and in voluntary disclosures such as sustainability or ESG reports.

## What you need to know

- **Greenwashing as "deceptive marketing".** Bill C-59 requires certain environmental and climate change-related representations to be backed up by testing, or by substantiation in accordance with internationally recognised methodology.
- **Private actions.** Bill C-59 introduces a private right of action against a company that is alleged to have contravened the Act's deceptive marketing provisions, including the new greenwashing provisions.
- **Environmental certificates.** Bill C-59 allows the Commissioner of Competition to issue certificates exempting certain otherwise illegal agreements or arrangements that are made "for the purpose of

protecting the environment" and that are "not likely to prevent or lessen competition substantially in a market". These exemptions do not apply to the new greenwashing provisions.

- **Royal Assent.** Bill C-59 received Royal Assent on June 20, 2024. The provisions on environmental representations came into force immediately upon receiving Royal Assent, although private enforcement will not be possible until one year thereafter.
- **Considerable uncertainty remains.** Businesses have reacted to these new provisions in different ways, with many expressing concerns about the legislation and its potential unintended consequences. Some businesses have added disclaimers to their historic environmental representations, while others have entirely withdrawn environmental representations, at least temporarily.

## Bill C-59 targets greenwashing related to both products and business activities

The amendments cover two specific types of environmental representations:

1. Statements, warranties or guarantees 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 are not based on an adequate and proper test.
2. Representations regarding 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 are not based on adequate and proper substantiation in accordance with internationally recognized methodology.

The new amendments are significant for several reasons.

First, they cover a wide range of "representations", not just

advertisements. For example, they would likely cover:

- claims that a product is “green”, “sustainable”, “recyclable”, “compostable”, “eco-friendly”, “carbon-neutral” or otherwise good for the environment or the climate; and
- claims that a company is “net-zero”, “sustainable”, or “nature-positive”, or that its business uses a certain percentage of “recyclable packaging”, “organic produce” or “clean electricity”.

Second, if a covered representation is alleged to contravene the Act, the onus is on the business making the representation to prove that it can be justified.

Third, the amendments introduce a relatively high bar to justify covered representations. Currently, environmental claims are covered by the general “misleading advertising” provisions of the Act; they must be “false or misleading in a material respect” to contravene the Act. Under the amendments, these claims may contravene the Act unless supported with an “adequate and proper test” (in the case of products) or “adequate and proper substantiation in accordance with internationally recognized methodology” (in the case of other business activities).

## Environmental and climate-related claims must be “adequate and proper”

The Act currently requires businesses to carry out testing when making claims about the “performance, effectiveness, or length of life” of a physical product. Competition Bureau guidance and case law sets out what constitutes an “adequate and proper test” to substantiate these types of claims: among other things, the test must be a circumstance-specific “procedure”. However, there is no guidance or case law on the new provisions. It is therefore unclear how the existing framework will be applied to a “statement, warranty or

guarantee" of a product's environmental "benefits". It may be difficult to determine whether a car is "eco-friendly", a seafood product is "sustainable" or electronics are "carbon-neutral" based on a test done under controlled circumstances. Other environmental claims may be better suited to an "adequate and proper test", such as whether a product achieves a certain energy efficiency rating, or whether it is recyclable or compostable.

The amendments require businesses to conduct "adequate and proper substantiation in accordance with internationally recognized methodology" to back up environmental representations; however, there is currently no guidance on what constitutes "adequate and proper substantiation". The aim of the amendments appears to be ensuring that companies can substantiate their environmental claims using widely adopted and independent approaches to evaluation. Depending on the nature of the claim, this could include relying on procedures and guidelines endorsed by a credible global body, such as an eco-certification regime (e.g., Toward Sustainable Mining standards, Forest Stewardship Council standards or Ocean Wise certification) or a standard-setting organization (e.g., the International Standards Organization). However, this test may be difficult to apply in contexts where environmental or climate-related claims are not subject to "internationally recognized" standards, but rather are better evaluated based on provincial or federal standards—and for some claims, there may be no standardized methodologies at all.

## Creation of a private right of action for greenwashing and other deceptive marketing practices

Bill C-59 also introduces a new private right of action to bring an application alleging that a company has contravened the Act's deceptive marketing provisions, including the new "greenwashing" provisions described above. Although court

authorization will be required to start a proceeding, such leave can be granted if the application is in the public interest, even if the applicant is not itself affected by the conduct.

This marks a significant departure from the current regime, which only allows the Competition Bureau to enforce the Act's deceptive marketing provisions.

## New greenwashing provisions cannot be waived with an environmental certificate

Bill C-59 also allows the Commissioner of Competition to issue certificates regarding certain agreements or arrangements between a party or parties that are made "for the purpose of protecting the environment" and that are "not likely to prevent or lessen competition substantially in a market". The certificate would create an exemption from the criminal and civil competitor collaborations provisions of the Act. Although this option may be useful in some cases, the new certificate process will not apply to the deceptive marketing provisions of the Act.

## Practical considerations

As companies evaluate the impact of these changes on their business, they should keep the following in mind when making representations regarding environmental protection and climate change mitigation:

- Consider whether any representations in any public channels could fall within the scope of the new rules.
- Consider whether any "in scope" representations have been tested or substantiated. If they have not been tested or substantiated, consider whether the representations can be modified to comply with the Act. Alternatively, conduct an appropriate test or substantiation to support the representation. If there

is no appropriate test or substantiation methodology, the representation may need to be withdrawn to ensure compliance with the Act.

- Consider risk-mitigation strategies. In the absence of an appropriate test or substantiation methodology, collect defensible and reliable data to support any environmental or climate-related representation and maintain records of this data. Develop strong internal processes to verify claims, using third-party verification systems where feasible, and include disclaimers alongside certain representations that require additional clarity.

The immediate impact of the new rules has been business uncertainty and disruption. Businesses have reacted to the new provisions in different ways: some have added disclaimers to historic representations to clarify that they do not necessarily reflect current views; others have withdrawn environmental representations in their entirety, at least temporarily. Business groups and governments have also expressed concerns about the legalization and its potential unintended consequences.

*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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