Spotlight On Greenwashing Under The Competition Act

Introduced at a time of proposed changes to securities laws and increased investor-driven demands to identify, disclose and monitor climate and sustainability risks, which we write about separately in our *Osler Legal Outlook* article, recent amendments to the *Competition Act* (Act) include the addition of two provisions aimed specifically at misleading statements and claims about the environmental attributes of a business, its products or its operations, known colloquially as "greenwashing". Starting in June 2025, private parties can seek significant monetary penalties and prohibition orders for greenwashing conduct, although direct financial compensation to those private parties is not available.

Unlike other laws related to the environment, these new provisions are not a means of advancing environmental policies through competition law. Rather, they are designed to ensure that environmental representations are not misleading and that claims are substantiated.

As a result, businesses need to be aware that the environmental claims regarding their products, services and business activities could be subject to increased scrutiny by the Competition Bureau (Bureau), as well as private party legal actions under the Act.

The approach under the Act and pending changes

The Act has always required that product and business activity representations not be misleading and that performance claims be substantiated by adequate and proper testing. Even prior to the amendments, the Bureau investigated and secured remedies against businesses regarding their environmental claims. The Bureau currently has several ongoing greenwashing investigations.

Under the new provisions, organizations bear the burden of proving, on a balance of probabilities, that any performance claim they make about "a product's benefits for protecting or restoring the environment or mitigating the environmental, social and ecological causes or effects of climate change" is based on an "adequate and proper test". They also must prove that any representation they make 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" is based on adequate and proper substantiation "in accordance with internationally recognized methodology".

While the requirement that claims be based on "adequate and proper testing" has existed for several decades, the requirement for substantiation "in accordance with internationally recognized methodology" is new. There is no definition of "internationally recognized methodology" in the Act. At this point, it is not clear whether, in practice, the requirement to substantiate "in accordance with internationally recognized methodology" will materially change the evidence required to demonstrate substantiation. For example, we anticipate that disclosure made in accordance with the specific methodologies mandated by securities laws would be considered appropriate substantiation.

It is important for organizations to recognize that the new provisions do not result in a significant change in the substantive law as to what constitutes a misleading representation or performance claim. Moreover, the misleading representations provisions of the Act continue to have a due diligence defence which provides that if an organization establishes that it exercised due diligence to prevent the misrepresentation, the only remedy available is a prohibition order. However, the combination of the new provisions with the new private enforcement regime under the Act may expose organizations to greater risk and liability as the changes reinforce existing law and signal a sharper focus on environmental claims.

In September, the Bureau completed a stakeholder consultation regarding the greenwashing provisions, after receiving a record number of submissions. The Bureau has committed to releasing expedited guidance to provide a predictable framework for the purpose of assessing the substantiation of environmental claims. In the interim, the Bureau has updated its Marketing Digest with helpful tips and reminders when making environmental representations or claims.

It remains to be seen whether a flood of litigation will be forthcoming. As noted, as of June 20, 2025, private parties may apply to the Competition Tribunal (Tribunal) for leave to bring an application for remedies under the Act's misleading representation provisions, including the greenwashing provisions. Leave – which refers to the Tribunal's permission to bring the case – will only be granted if the Tribunal determines that the case is in the "public interest". It is not yet clear what this means for claims. Many stakeholders have called upon the Tribunal to provide guidance on this point. At a minimum, it is clear under the Act that if an inquiry is ongoing or a settlement has already been reached with the Bureau regarding the same matter, leave will not be granted.

It is less clear how this public interest test will interact with claims or enforcement action in other circumstances, such as under securities law. Unlike most other provisions of the Act, private parties have always been able to challenge greenwashing in the general commercial courts under the criminal misleading representation provisions of the Act and provincial consumer protection laws. In fact, private parties have done so regularly for more than a decade. Given that the new greenwashing provisions will not give rise to a civil right of action for monetary damages, if private parties want to recover monetary relief or damages, they must follow the well-trodden path of these previously existing routes.

Among the possible or likely early private litigants seeking to take advantage of the new private right of action are certain activist environmental groups. Many of these groups advocated for the new provisions and have long been pursuing businesses by lodging formal complaints with the Bureau with no particular interest in securing monetary relief for themselves. Once the new private access regime comes into force, these groups, assuming the Tribunal grants leave, will be able to file and litigate applications for remedies directly and on their own terms.

Business preparation for 2025 and beyond

There are many things that organizations can be doing now as we await further guidance from the Bureau.

As was the case before the amendments, it is critical that organizations make environmental claims or representations responsibly. That means making such claims on a supportable basis, in a manner that is consistent with the most recent evidence. Such claims must also be capable of being substantiated by methodologies of independent parties with well-recognized expertise in the appropriate field.

As the onus of proof is on the organization making

representations or claims, it is advisable to clearly disclose the substantiation sources and evidence that supports the claim.

This may include citing specific third-party back-up, where possible, for quantitative data relating to statements about environmental matters.

Organizations should maintain an internal file to corroborate statements made about their actions that relate to protecting or restoring the environment or mitigating the environmental or ecological causes or effects of climate change.

Finally, all organizations need to be mindful when referring to “green” or “clean”. These terms should be used cautiously and only in circumstances where the references are less susceptible to ambiguity and challenge.

The amendments to the Act provide a good opportunity for organizations to stop and take stock of the nature and extent of their statements on climate-related and other environmental matters. Businesses should also consider how the metrics upon which they rely to support environmental claims are calculated and confirm their comfort with the data inputs and systems that support those metrics.

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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