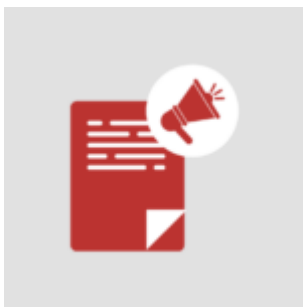


The Next Frontier In Competition Litigation: Greenwashing Disputes And Private Access To The Competition Tribunal



2024 has been a year of change for competition law in Canada. As in 2023, Parliament passed a number of amendments to the *Competition Act* (the Act), which are either already in force or will come into force in June 2025. In this article, we discuss two amendments that will almost certainly lead to litigation: provisions targeting “greenwashing”, and those changing the test for private parties to bring cases before the Competition Tribunal.

Greenwashing

The new provisions in the *Competition Act* targeting greenwashing came into effect at the end of June 2024 (our colleagues covered the changes in depth [in a previous bulletin](#))¹. The provisions, added to the part of the Act which deals with deceptive marketing, place an additional onus on those making claims about the benefits of their products or services in relation to protecting or restoring the environment, or mitigating the causes or effects of climate change. Statements related to a product’s environmental benefits must be based on “an adequate and proper test, the

proof of which lies on the person making the representation”².

Where the representation relates to the benefits of a business or business activity, it must be based on “adequate and proper substantiation in accordance with internationally recognized methodology”³. Parliament provided no detail on what constitutes an “internationally recognized methodology”, meaning that businesses will need to wait for guidance from the Competition Bureau as well as future court decisions interpreting the provisions. As the Commissioner of Competition has said he anticipates the Bureau will take more enforcement actions in the wake of this latest round of amendments to the Act⁴, we may not have to wait long for court decisions interpreting these provisions.

The Bureau has acknowledged the desire for guidance on the greenwashing provisions and has stated that it is moving quickly to provide it⁵. The new provisions raise many questions, such as what will be included in the social effects of climate change.

The Bureau sought public comments on these new provisions between July and September 2024 to help inform its enforcement guidance⁶. In the interim, it stated that it does not view the greenwashing provisions as a “revolution”, but rather an “evolution” of the existing misleading advertising provisions⁷.

Amendments to the private access regime

Parliament has also revised the regime for private parties to bring cases before the Competition Tribunal. The general scheme for enforcing the Act is that parties can raise concerns with the Competition Bureau, which then investigates the complaint. If the complaints are considered well-founded, the Commissioner may bring a proceeding before the Competition Tribunal (there are certain sections of the Act that can

ground civil claims for damages, but those claims are made in the superior courts of the provinces or the Federal Court, not the Tribunal). There is also a “private access” regime in the Act that allows parties to bring claims directly to the Competition Tribunal, after obtaining permission from the Tribunal. That regime has not seen a great deal of use since it was introduced in 2002.

Parliament has now made two changes to the private access regime, which will come into effect in 2025: (1) broadening the types of cases that private litigants can try to bring before the Tribunal (including those under the new greenwashing provisions); and (2) changing the test the Tribunal must consider when granting leave.

In addition to cases related to abuse of dominance, refusal to deal, exclusive dealing and price maintenance, private litigants can now seek permission to bring proceedings before the Tribunal related to deceptive marketing and agreements that substantially prevent or lessen competition⁸.

Parliament has also changed the test for granting leave. Prior to the amendments, a private litigant generally had to show that their business had been directly and substantially affected by the conduct complained of in order to obtain leave from the Tribunal⁹. Now, a person need only show that part of their business is directly and substantially affected by the conduct complained of, or that it is in the public interest for the Tribunal to grant leave¹⁰. For misrepresentation claims, leave can only be sought based on the case being in the public interest¹¹.

For certain types of cases, Parliament has also expanded the scope of remedies which the Tribunal can award to include remedies beyond the parties who bring the claim. For example, for abuse of dominance, the Tribunal can now order a person to pay an amount not exceeding the benefit derived from the

conduct complained of to be distributed to the applicant and any other affected person¹². It is unclear how the Tribunal will ultimately use these new powers, or how they will interact with better-known remedies like class actions. How long it will take to get clarity on these questions will depend on how much use private parties make of the amended private access regime.

Footnotes

1 *Competition Act*, R.S.C., 1985, c. C-34, [ss. 74.01](#).

2 *Ibid.*, section 74.01(b).

3 *Ibid.*, section 74.01(b.2).

4 Matthew Boswell, [The new era of competition enforcement in Canada](#). Competition Bureau Canada (September 26, 2024).

5 *Ibid.*

6 [Public consultation on Competition Act's new greenwashing provisions](#). Government of Canada (October 23, 2024).

7 Matthew Boswell, [The new era of competition enforcement in Canada](#). Competition Bureau Canada (September 26, 2024).

8 *Fall Economic Statement Implementation Act*, 2023, SC 2024, c 15 ([Bill C-59](#)), s. 254(1).

9 *Competition Act*, RSC 1985, c C-34, [s. 103.1\(7\)](#).

10 *Fall Economic Statement Implementation Act*, 2023, SC 2024, c 15 ([Bill C-59](#)), s. 254(4).

11 *Ibid.*

12 *Ibid.*, s. 247(2).

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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