COMPETITION BUREAU RELEASES DRAFT GREENWASHING ENFORCEMENT GUIDELINES: A PRAGMATIC APPROACH

Posted on January 13, 2025

Categories: Insights, Publications

On December 23, 2024, the Competition Bureau (the "**Bureau**") released for public comment draft enforcement guidelines ("**Draft Guidelines**") concerning environmental or "green" claims. This bulletin discusses the key elements of the Draft Guidelines and their implications for businesses making green claims.

Interested stakeholders are encouraged to submit their comments to the Bureau before the February 28, 2025 deadline.

Background

On June 20, 2024, the Competition Act's deceptive marketing provisions were amended to include two new provisions: the first regarding the making of environmental claims about products (including services) or business practices, and the second providing a right of private application to the Competition Tribunal (with leave) pursuant to which parties may challenge environmental claims under the deceptive marketing provisions.[1]

Since that time, businesses have expressed significant concerns regarding these new greenwashing provisions, largely due to: (i) the breadth and uncertainty of the language of these provisions; (ii) the lack of guidance from the Competition Bureau regarding the Bureau's enforcement approach; (iii) the new right of private enforcement, (iv) the absence of any transition period to allow businesses to develop policies and practices to comply, and (v) the significant penalties associated with failure to comply.

On July 22, 2024, the Competition Bureau launched a public consultation to help inform the Bureau's development of enforcement guidelines about environmental representations, which resulted in more than 200 submissions.[2]

Overview of the four provisions that may apply to environmental claims

The Draft Guidelines provide a brief overview of key concepts underlying the deceptive marketing practices provisions of the Competition Act that may also have application to environmental claims, specifically:

- The general provisions against false or misleading representations, which are sufficiently broad to apply to environmental claims related to products and business interests, which includes an assessment of both the general impression and the literal meaning of a representation (section 74.01(1)(a));
- The general provisions governing product performance representations, which are sufficiently broad to apply to environmental claims related to products, and require performance claims to be supported by adequate and proper testing (section 74.01(1)(b)); and
- The new greenwashing provisions, being:
    - claims about the environmental benefit of a product (including a service), which requires claims in the form of a statement, warranty or guarantee of a product's benefits in respect of the environment to be based on "adequate and proper testing", which provision is a specific example the general provision governing product performance representations (section 74.01(1)(b.1)); and
    - claims about the environmental benefits of a business or business interests (section 74.01(1)(b.2)), which requires claims about the environmental benefits of a business or business interests to be based on "adequate and proper substantiation" in accordance with "internationally recognized methodology" (see below "*Guidance re: Substantiation of environmental claims of a business or business interest*").

Of interest, the Bureau confirms in the Draft Guidelines that businesses are not required to publicly disclose the information that supports/substantiates the environmental claims. A business's decision to disclose such supporting information and the granularity of the information to be disclosed will depend on a balance of factors, including: the benefits of transparency (including credibility with the public), whether such disclosure may reduce the risk of challenges by third parties, and whether the supporting information contains confidential information, can be clearly communicated, and/or is capable of multiple interpretations.

This analysis is the same as that which applies to any advertised claim that relies on proof of substantiation that may or may not be set out in the advertising itself.

Key Elements of the Draft Guidelines

Focus on Consumer Protection: Promotional / Marketing Representations

The Draft Guidelines suggest a limit on the scope of application of the greenwashing provisions, which has been a focus of significant concern by many businesses. For example, the Draft Guidelines refer to the Bureau's core mandate related to "marketing and/or promotional representations" (i.e., consumer protection), and not "representations made exclusively for a different purpose, such as to investors and shareholders in the context of securities filings."

Whether the Bureau's attempted pragmatism in limiting the scope of these greenwashing provisions will

ultimately be supported by the Competition Tribunal or courts remains to be determined. Strictly, the Draft Guidelines, even when finalized, will not be binding on the Bureau, the Competition Tribunal or the courts, and cannot restrict private parties seeking to take action against businesses under the greenwashing provisions. Accordingly, an element of uncertainty will remain until case law has been developed.

However, the Bureau's interpretation does align with the purpose of the *Competition Act*, which is to maintain and encourage competition in Canada in order to, among other things, provide consumers with competitive prices and product choice. Further, this interpretation also aligns with recent statements by the Tribunal that, although the goals of the Competition Act are broader than just consumer protection, "[t]he focus of the deceptive marketing provisions [which includes the new greenwashing provisions] is the consumer".[3] Such interpretation may limit the scope of applications by private parties, who may only challenge conduct under the greenwashing provisions with leave from the Tribunal, which leave may be granted only if in the public interest. Moreover, as noted in the Draft Guidelines, the "Bureau then has the right to intervene in the case, and it will have regard to these guidelines when doing so". In this regard, the Bureau intends to publish guidance with respect to the private access to the Tribunal, hopefully well in advance of June 20, 2025, at which time private parties may file applications seeking leave from the Tribunal in respect of environmental claims.

Moreover, whether businesses (or the Competition Tribunal and courts) can compartmentalize representations made for marketing/promotional purposes and representations made for purposes other than marketing (e.g., compliance with securities laws, applications/submissions to governments in accordance with regulatory regimes, etc.) remains to be tested. As noted in the Draft Guidelines: *"… if the information…is then used by the business in promotional materials, the Bureau will consider the representations to be marketing representations."* The Draft Guidelines interpret marketing and/or promotional materials broadly, to include online and in-store advertisements, direct mail, social media messages, and promotional emails. In this context, concerns may arise to the extent representations made for purposes other than marketing / promotion of products or businesses are subsequently used for promotional purposes. Consider, for example, the following scenarios:

- A mandatory report is prepared by a business in strict compliance with a regulatory regime, but such report cannot be substantiated by an internationally recognized methodology as contemplated by the Draft Guidelines (noted below). Concerns may arise if the business subsequently discloses the report (or information in the report) to the public (e.g., on its website).
- In the case of voluntary environmental reports, it is increasingly expected that businesses prepare such reports to demonstrate their detailed commitments to environmental principles, and their corresponding targets and actions in respect of such commitments. Some, but not all, of the information in such reports may have been prepared by businesses in accordance with regulatory regimes, including

applicable securities laws. To the extent that a business cannot substantiate the environmental claims in such a report in the manner contemplated by the Draft Guidelines, concerns may arise.

General Principles: Environmental Claims

The Draft Guidelines set out six principles for compliance to help businesses assess whether their environmental claims comply with the requirements of the Competition Act. These principles are largely standard tenants of advertising substantiation, and are nearly identical to the guidance provided by the Bureau in the *Deceptive Marketing Practices Digest – Volume 7* dated July 22, 2024[4]. The only notable exception is the updating of Principle 6 in the Digest relating to "aspirational claims", arguably broadening this guidance by moving away from the term "aspirational claims" in favour of the broader phrase "environmental claims about the future". The six principles are as follows:

1. Environmental claims should be truthful, and not false or misleading.
2. Environmental benefits of product and performance claims should be adequately and properly tested.
3. Comparative environmental claims should be specific about what is being compared.
4. Environmental claims should avoid exaggeration.
5. Environmental claims should be clear and specific – not vague.
6. Environmental claims about the future should be supported by substantiation and a clear plan:

- The Bureau advises that forward-looking claims should be properly substantiated using an "internationally recognized methodology" as required by the new greenwashing provisions of the Competition Act. See below "*Guidance re: Substantiation of claims environmental benefits of a business*".
- The environmental goal should be well-defined, with a clear understanding of the requirements to meet the goal including a concrete, realistic and verifiable plan with interim targets coupled with meaningful steps and progress toward the goal.

Guidance re: Substantiation of environmental claims of a business

The Draft Guidelines include guidance on the meaning of "adequate and proper" substantiation in accordance with "internationally recognized methodology" for environmental claims of a business or business activities, with the key concepts including:

- A business is not required to follow any (particular) standards, but rather focuses on the methodology used (that may or may not be reflected in one or more standard).

- A business is not required to rely on the "best" methodology. However, the methodology should be:
    - Reputable and robust (which would increase the likelihood of the methodology being adequate and proper).
    - Adequate and proper in the circumstances, including with regard to the Canadian context as appropriate (e.g., geography. climate, etc.).
    - Be internationally recognized.
        - A methodology would be "internationally recognized" if it is recognized in two or more countries (not necessarily recognized by the governments of two or more countries).
        - An internationally recognized methodology may be developed by an industry, subject to the requirement that the substantiation must be adequate and proper.
- Third-party verification is not necessary, unless the internationally recognized methodology used to substantiate a claim requires third-party verification, noting, however, that third-party verification "may improve the credibility" of claims from a consumer's perspective.
- A business may rely on data used in a business's operations to substantiate a claim, provided that such data has been collected and evaluated in accordance with an internationally recognized methodology that is adequate and proper.
- The standard of substantiation does not necessarily require "testing".[5]
- With regard to "net zero" claims in particular, the Bureau recognizes there are many standards that can offer adequate and proper substantiation in accordance with methodologies that are internationally recognized. These claims should be supported by concrete, realistic and verifiable plans (as with all claims about the future).
- With regard to the "new technologies" for which an internationally recognized methodology has not been recognized, a business may be able to rely on multiple, differing internationally recognized methodologies that, when taken together, can create substantiation for the claim, or that are used for substantiating similar claims, subject to the caveat that if a business cannot substantiate a claim, it should not make such claim until an internationally recognized methodology is developed. Business should be alert to developments in methodologies that may require updates to claims.
- Even where compliance with the new substantiation requirements has arguably been achieved, businesses should remain mindful of the Bureau's six general overarching principles to ensure the claim does not contravene the general misleading representations provisions in the Competition Act (e.g., the literal meaning and general impression of the representation should not be misleading or false in any material respect). (See "*General Principles: Environmental Claims*").

While the Bureau has stated that it will not seek to hold anyone liable for a breach of the new provisions of the Competition Act before they came into force on June 20, 2024, enforcement of claims that breached the pre-

existing materially false or misleading claims provisions remain a risk.

Due Diligence Defence

The Draft Guidelines explicitly confirm that the due diligence defence set out in Section 74.1(3) of the Competition Act continues to be available to businesses in respect of claims under the new greenwashing provisions, meaning that it is important that businesses develop, adopt, and maintain the currency of credible and effective compliance programs in order to demonstrate that they exercised all reasonable care to prevent the contravention.

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The Competition Act greenwashing provisions are complex and uncertain, and failure to comply with these provisions may have a significant impact on businesses. Accordingly, to identify potential concerns and mitigate liability under these new provisions, businesses should assess and potentially modify their existing environmental statements and establish processes to be followed when making new environmental statements. For assistance navigating these greenwashing provisions, please contact McMillan's Competition and Antitrust Group or the Environment Group or your McMillan relationship partner.

We will provide further updates and guidance as part of our series delving into the Competition Act amendments, including once the Bureau issues final guidelines.

[1] See McMillan's bulletin providing an overview of the greenwashing provisions.
[2] See Competition Bureau seeks feedback on *Competition Act*'s new greenwashing provisions and Public consultation on Competition Act's new greenwashing provisions.
[3] See Canada (Commissioner of Competition) v Cineplex Inc , 20 24 Comp Trib 5 at para. 233.
[4] See The Deceptive Marketing Practices Digest - Volume 7.
[5] Note that case law has determined that where an "adequate and proper test" is required, there must be a test. A logical conclusion by an educated person based upon the available facts is not a "test".

by McMillan's Competition, Antitrust & Foreign Investment Group and the Environmental Group

A Cautionary Note