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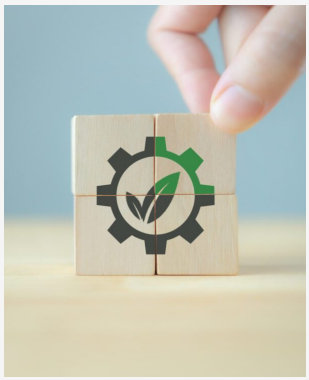
Competition Bureau releases draft environmental claims guidelines for public consultation



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Environmental claims have been a topic of significant discussion in Canada this past year, as two new "greenwashing" provisions to the *Competition Act* (the Act) came into force[1] alongside proposed changes to securities laws and increased investor-driven demands to identify, disclose and monitor climate and sustainability risks. Following the enactment of the new greenwashing provisions on June 20, 2024, the Competition Bureau (the Bureau) launched a public consultation to inform the development of enforcement guidelines. This consultation received a record number of submissions from a wide range of stakeholders, underscoring the interest from businesses, consumers and public interest groups in the Bureau's approach to environmental claims.[2]

On December 23, 2024, the Bureau released a draft of its much-anticipated guidelines on environmental claims (the draft guidelines). The Bureau will hold a new public consultation regarding the draft guidelines, accepting comments from public stakeholders until the end of February 2025.

Observations from the draft guidelines

The draft guidelines reflect and reinforce much of the Bureau's past guidance on the application of the Act to environmental claims. For instance, the draft guidelines build upon the same six general principles for businesses published in Volume 7 of the Bureau's *Deceptive Marketing Practices Digest* in July 2024, released shortly after the new provisions came into force. These core principles are as follows:

1. Environmental claims should be truthful, and not false or misleading.
2. Environmental benefit 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 draft guidelines expand on the above principles, while providing additional clarity through a breakdown of each relevant deceptive marketing provision in the Act and a "Frequently Asked Questions" section.

Below, we summarize key observations from the draft guidelines that are important for businesses to consider before making environmental claims.

A practical approach to understanding 'internationally recognized methodologies'

The new greenwashing provision targeting environmental claims regarding a business or business activity requires that such claims be based on adequate and proper substantiation "in accordance with internationally recognized methodology". This reference to "internationally recognized methodology" garnered controversy, as the term was left undefined in the Act.

The draft guidelines provide the Bureau's interpretation of the new term. The Bureau states that it will "likely consider a methodology to be internationally recognized if it is recognized in two or more countries". Importantly, it also comments that the Act does not necessarily require that the methodology be recognized by the governments of those countries, nor must it be the "best" methodology available. The draft guidelines also note that methodologies required or recommended by government programs in Canada for substantiating environmental claims are in the first instance assumed by the Bureau to be consistent with internationally recognized methodologies. However, businesses should still exercise due diligence to ensure that the methodology is "internationally recognized."

By adopting this flexible interpretation of what qualifies as an internationally recognized methodology, the Bureau has taken a pragmatic approach that should quell some concerns regarding the perceived ambiguity of the term (although the draft guidelines are not binding on the Competition Tribunal, and future case law could interpret the term differently).

Focus on marketing misrepresentations

The draft guidelines clarify that when the Bureau enforces the deceptive marketing provisions of the Act, it is focused on representations made in marketing and promotional materials. The draft guidelines explicitly state that the Bureau is not focused on "representations made for a different purpose, such as to investors and shareholders in the context of securities filings." However, if information used in these other materials are then used in promotional materials, the Bureau will view such representations as marketing.

When the private enforcement regime comes into force in June 2025, private litigants will not be bound to follow the Bureau's guidance when determining whether to seek leave to commence an application at the Competition Tribunal. As such, it remains to be seen if private parties will adopt the Bureau's position on representations in regulatory filings or if they will seek to test the Bureau's enforcement position before the Competition Tribunal.

Caution for forward-looking environmental claims and claims regarding new technologies

The Bureau reiterates its position that before businesses make forward-looking environmental claims (e.g., concerning emissions reductions or carbon neutrality by a future date), the claims should be properly substantiated, accompanied by a "concrete, realistic and verifiable plan" to fulfill the claim, and "meaningful steps" in furtherance of that plan should already be underway.

The draft guidelines also address the issue of substantiating claims regarding the benefits of a business or business activity that involves new technologies. The Act now requires that such representations must be based on "adequate and proper substantiation in accordance with internationally recognized methodology". If there is no methodology designed for testing a claim regarding a new technology, reference may be made to other internationally recognized methodologies that "together can create substantiation for the claim, or that are used for substantiating similar claims." If the business concludes that the claim cannot be substantiated, even with reference to other available methodologies, it should avoid making the claim. If an internationally recognized methodology that is directly relevant to the claim is later developed, the business should substantiate the claim in accordance with that methodology to ensure compliance.

For representations regarding the environmental benefits of a product, the representation must be based on "an adequate and proper test". (There is no explicit requirement in the Act that the testing accords with an internationally recognized methodology for such testing.)

Substantiation for net-zero claims

The draft guidelines note that "many" standards can offer adequate and proper substantiation in accordance with internationally recognized methodology for net-zero claims. When formulating such claims, however, businesses should also consider the Bureau's six general principles.

Confirming the applicability of the 'due diligence' defence

As expected, the draft guidelines confirm that the due diligence defence — which has long been available for alleged violations of the Act's civil deceptive marketing provisions — is available to environmental claims. The due diligence defence provides that only a prohibition order is available as a remedy if the person making the claim establishes that they exercised due diligence to prevent the reviewable conduct from occurring (e.g., by taking measures to ensure the veracity of the claim, implementing an effective compliance program, etc.).

Substantiation for claims not required to be publicly disclosed

While a party making an environmental claim must, if challenged, be able to prove on a balance of probabilities that the claim is properly substantiated, the draft guidelines clarify that the supporting information does not need to be made publicly available. However, businesses may still prefer to publicize such information to demonstrate the veracity of the claim to consumers, as well as to reduce the risk of litigation.

Treatment of environmental claims made prior to the new greenwashing amendments

While the Bureau will not pursue enforcement action under the new greenwashing provisions for breaches occurring before the amendments came into force (on June 20, 2024), the draft guidelines state that the Bureau may still pursue such claims that are captured by other deceptive marketing provisions in the Act (as has always been the case).

Cases before the Competition Tribunal and forthcoming guidance on private applications

As of June 20, 2025, private parties will be able to seek leave from the Competition Tribunal to file applications relating to a broad range of reviewable practices. This expanded private access also includes the civil deceptive marketing provisions of the Act, which were previously only enforceable by the Commissioner of Competition. The draft guidelines indicate that the Bureau expects to release updated guidance on private access to the Competition Tribunal separately.

The draft guidelines rightly highlight that the Competition Tribunal is not bound by the Bureau's guidance, but it may consider Bureau guidance when considering an application (whether for leave or on the merits). In circumstances where the Competition Tribunal grants a private party leave, the Bureau may intervene and such decisions would be informed by the Bureau's existing guidance on the enforcement of environmental claims.

A new consultation: next steps

The Bureau is conducting a public consultation on the draft guidelines and will accept comments until February 28, 2025. Following the completion of this new consultation period, the Bureau will publish a finalized version of the guidelines.

Osler's Competition, Trade and Foreign Investment group will continue to release additional commentary on the implications of the recent amendments to the Act, including as new guidance becomes available and other details are provided. For the latest insights and developments on these important changes to Canadian competition law, we invite you to subscribe to our Updates.

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[1] For more information regarding the greenwashing amendments to the Act, please refer to our prior Osler Update on the June 2024 amendments, as well as our 2024 Osler Legal Outlook entry on greenwashing under the Act.

[2] For more information regarding the Bureau's prior consultation on environmental claims, please refer to the Competition Bureau's consultation webpage. Copies of public submissions received by the Bureau can also be found online.