False advertising and greenwashing: Bill C-59 changes to Competition Act

July 17, 2024

Bill C-59, *The Fall Economic Statement Implementation Act*, 2023 (Bill C-59) took effect on June 20, 2024, bringing significant changes to the *Competition Act*, including new explicit provisions targeting misleading environmental benefit claims (greenwashing). Significantly, the amendments place the burden of proving that environmental benefit claims *are* based on adequate and proper testing or substantiation on the party making them, a significant reversal from previous law.

The changes will also broaden the reach of the law by enabling private parties (which could include environmental activists and climate advocacy groups), to bring cases for deceptive advertising practices directly before the Competition Tribunal (the Tribunal) as of mid-2025.

It is very important that companies carefully review, assess and adapt their public facing environmental benefits claims, including their environmental, social and governance (ESG) frameworks and commitments, to ensure that they comply with the new provisions.

New provisions on greenwashing claims – including a reverse onus

Businesses already face litigation risk for alleged greenwashing under existing federal and provincial laws. Adding to this, Bill C-59 expands the potential liability for greenwashing in two ways. First, Bill C-59 amends section 74.01 of the *Competition Act* to expressly address misleading environmental benefits claims made to the public:

- Any statement, warranty or guarantee 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 testing; and
- Any representations 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** that are **not**

based on adequate and proper substantiation in accordance with internationally recognized methodology.

Secondly, the onus is placed on the advertiser making such claims to prove, if they are challenged, that the claims are based on adequate and proper testing or substantiation.

These changes will make it significantly easier for the Commissioner of Competition (the Commissioner), and soon private parties, to take enforcement action against greenwashing. Previously, the Commissioner needed to rely on the general misleading advertising provisions of the *Competition Act* and bore the burden of proving that the environmental claims were materially false or misleading. These new provisions expressly identify types of problematic environmental claims, and force the advertiser, if challenged, to effectively bear the burden of proving that the claims are not misleading. This is a major change.

"Adequate and proper " test

Over the years, the Commissioner has challenged a wide variety of product performance claims in different industries. While the phrase "adequate and proper" is not defined in the *Competition Act,* it is evident from case law and guidance issued by the Competition Bureau (the Bureau), that in the conduct of claims made about products, adequate and proper testing must be conducted before the claim is made, and the requirements for such testing will depend on the nature of the claim and its general impression. However, it is unclear how this test will apply to the phrase "business or business activity".

Also, the phrase "adequate and proper substantiation in accordance with internationally recognized methodology" is vague and unclear. It is not defined in the *Competition Act*, and until there is case law or guidance from the Bureau on what it means, it is not clear how the vast array of potentially conflicting methodologies will be harmonised. The Bureau has said that it is still assessing the impacts of these new requirements, and that it will provide guidance in due course.

Why are these significant changes important to companies in Canada?

The changes that Bill C-59 bring will not only make it easier for the Commissioner to take action against greenwashing, but it will soon be easier for private parties to do so as well. As of June 20, 2025, private parties can seek leave to bring actions for deceptive advertising directly before the Tribunal if they can show "public interest." Therefore, individuals and businesses will no longer need to rely on the Bureau to take action on greenwashing complaints. These new private rights of action may also potentially create a de facto class action type of regime, without the need for certification.

Businesses and industry representatives have noted the uncertainty arising from Bill C-59. Pathways Alliance, a consortium of Canada's largest oil sands producers, has removed content from its website, social media, and other public platforms, stating that the amendments "create significant uncertainty for Canadian companies that want to

communicate publicly about the work they are doing to improve their environmental performance, including to address climate change." The Canadian Association of Petroleum Producers (CAPP) has stated that through the amendments, "businesses across Canada are being put at significant risk for communicating their efforts to reduce their impact on the environment." The CAPP has encouraged the Bureau to consult with Canadian businesses on how it will implement the amendments to the *Competition Act*. On July 4, 2024, the Bureau announced that it would "develop guidance on an accelerated basis in consultation with a broad range of stakeholders" and that to inform that process, it would be launching a public consultation to which interested parties can provide feedback.

General provisions on false or misleading claims under the *Competition Act*

In recent years, businesses in Canada and abroad have faced increasing scrutiny for "greenwashing," which the Bureau generally refers to as false or misleading environmental advertisements or claims. Notwithstanding the new explicit provisions under Bill C-59, greenwashing claims are also subject to the general provisions on deceptive marketing in the *Competition Act* and in provincial consumer protection legislation.

Section 52 of the *Competition Act* makes it an offence for a person to make a representation knowingly or recklessly to the public that is false or misleading in a material respect for the purpose of promoting a business interest. Upon conviction for an indictable offence, a court can impose a fine without restrictions, imprisonment for up to 14 years, or both.

Also, section 74.01 of the *Competition Act* prescribes civil consequences for representations that are false or misleading in a material respect. Unlike the criminal provision under section 52 of the Act, section 74.01 does not require a person to have "knowingly or recklessly" made a false or misleading statement. Also, an offence under section 52 requires proof beyond a reasonable doubt, whereas the Commissioner need only prove misconduct under section 74.01 on a balance of probabilities.

Under both sections 52 and 74.01, it is not necessary to prove that any person was deceived or misled.

In determining whether a representation is false or misleading, the Tribunal or a court will consider the "general impression" and the literal meaning of the representation. The "general impression" test considers how an ordinary, hurried consumer would understand the representation. In the context of greenwashing, the general impression of an environmental claim may be false or misleading where, based on the claim, a consumer believes that a product that does not harm, or actively supports, the environment, when in fact the product is detrimental to the environment.

The Commissioner may apply to the Tribunal, the Federal Court, or a superior court of a province (or a private party may apply to the Tribunal beginning in 2025) to seek administrative remedies for breaches of section 74.01. These remedies may include orders to cease the conduct at issue and publish a notice correcting the alleged misrepresentation. For corporations, the Tribunal or court may impose an administrative

monetary penalty (AMP) of up to the greater of (A) $10,000,000 (and $15,000,000 for each subsequent order), and (B) three time the value of the benefit derived from the deceptive conduct, or if that amount cannot be reasonably determined, 3 per cent of the corporation's annual worldwide gross revenues.

Alternatively, the Commissioner and a person accused of reviewable conduct under section 74.01 can enter into a consent agreement. The consent agreement will generally include terms for the person to cease certain conduct, publish a notice correcting a false or misleading claim, and pay an administrative penalty.

Complaints and inquiries under the *Competition Act*

Under section 9 of the *Competition Act,* any six Canadian residents who are above 18 years of age can apply to the Commissioner for an inquiry into certain alleged contraventions of the *Competition Act*, including for false or misleading representations. The Commission may then open an inquiry into the matter. The Minister of Industry can also direct the Commission to open an inquiry.

The Commissioner has vast investigative powers during an inquiry, including powers to apply for court orders compelling persons to provide oral testimony, preserve or produce records, and provide written responses to questions. The Commissioner can also apply to a court for a warrant to enter and search premises to further an investigation under the *Competition Act*.

At any stage of an inquiry, or instead of an inquiry, the Commissioner can refer a matter to the Attorney General of Canada. The Attorney General of Canada may then decide whether pursue a criminal prosecution for offences under the *Competition Act*.

Further, with the amendments from Bill C-59, the *Competition Act* now includes provisions that allow private parties to enforce provisions of the Act, including those related to greenwashing claims. If granted leave by the Tribunal, a private party can pursue interim injunctive relief, final orders, and administrative monetary penalties against companies. The private party and company can also enter into a consent agreement to resolve the action, although the Commissioner may apply to the Tribunal to vary or rescind the consent agreement.

Private rights of action for greenwashing claims

The changes that Bill C-59 bring will not only make it easier for the Commissioner to take action against greenwashing, but it will soon be easier for private parties to do so too. As of June 20, 2025, private parties can seek leave to bring actions for deceptive advertising directly before the Tribunal if they can show "public interest". Therefore, individuals and businesses would no longer need to rely on the Bureau to act on their greenwashing complaints.

Recent trends in greenwashing complaints

Even before the passage of Bill C-59, private activists and environmental groups have increasingly used the *Competition Act* to challenge environmental statements made by

businesses in Canada. With the recent amendments to the *Competition Act*, Businesses can expect increased scrutiny and litigation challenging their environmental statements.

On Feb. 8, 2024, Stand Environmental Society (Stand.earth) announced that it had filed a complaint with the Bureau against Lululemon for allegations of greenwashing. The complaint focuses on Lululemon's "Be Planet" campaign, in which the company highlighted the use of recycled fabrics in its products and pledged to reduce greenhouse gas emissions.

In its complaint, Stand.earth referred to Lululemon's 2022 Impact Report and third party sources to make arguments about the environmental impacts of Lululemon products. Notably, Stand.earth highlighted Lululemon's "Scope 3" emissions, which encompass all indirect emissions that occur in the value chain of the reporting company, including both upstream and downstream emissions. Referring to Lululemon's own 2022 Impact Report, Stand.earth argued that Lululemon's Scope 3 emissions had more than doubled since 2020.

Stand.earth has asked the Commissioner to seek a judicial order under section 74.1 of the *Competition Act* to require, among other things, that Lululemon:

- Remove its Be Planet marketing campaign from its website and all other public forms of communication;
- Issue a formal apology to all of its Canadian customers; and
- Pay an AMP of up to 3 per cent of Lululemon's annual worldwide gross revenues, credited to the Environmental Damages Fund and to be paid to an organization for the purposes of climate mitigation and adaptation in Canada.

The Bureau has informed Stand.earth that it has opened a formal investigation into its complaint.[1] However, at this time, there have been no final determinations about the complaint.

The complaint of Stand.earth is part of a larger trend of environmental groups submitting complaints to the Bureau.

On Jan. 6, 2022, Keurig entered into a consent agreement with the Bureau to resolve claims about the recyclability of single-use Keurig coffee pods. Keurig agreed to pay a $3 million penalty, donate $800,000 to a charitable organization focused on environmental causes, pay $85,000 for the Bureau's costs of investigation, change its claims and packaging, publish corrective notices, and enhance its corporate compliance program. Notably, despite this settlement, Keurig still faces class action litigation in British Columbia, Ontario, and the Federal Court for alleged misleading or deceptive marketing practices relating to its coffee pods.

Also, in October 2022, the Bureau opened an inquiry into RBC for its environmental claims. The inquiry is in response to a complaint by private citizens accusing RBC of making claims about its purported climate actions while simultaneously funding fossil fuel development. In February 2023, the Bureau also opened an inquiry into Sustainable Forestry Initiative (SFI), North America's largest certification system for sustainable forestry practices. Greenpeace filed a complaint with the Bureau, disputing SFI's claims about its sustainable forestry certification scheme. The Bureau's inquiries into RBC and SFI remain ongoing.

These complaints to the Bureau follow a rising global trend in greenwashing complaints. One example of complaints and litigation over greenwashing outside of Canada is a recent decision from the Netherlands regarding the Royal Aviation Company (KLM). An environmental group in the Netherlands alleged that KLM had misled consumers by claiming that it used sustainable aviation fuels and contributed to reforestation efforts. The District Court of Amsterdam found that a number of the airline's environmental claims were misleading and unlawful under the Netherlands *Unfair Commercial Practices Act*. The Court made a declaration to this effect and ordered that KLM pay the costs of the proceeding.

Greenwashing claims under provincial legislation

Beyond the class framework in the *Competition Act*, businesses may face greenwashing claims under provincial legislation, as illustrated by a recent claim against Fortis under British Columbia's *Business Practices and Consumer Protection Act* (BPCPA).

Stand.earth and two residents of British Columbia have sued three Fortis entities, claiming that Fortis has breached the prohibitions on deceptive marketing under section 5 of the BPCPA. The plaintiffs dispute with Fortis' claims about the affordability and climate benefits of natural gas.

Among other allegations, the plaintiffs say that Fortis has misled customers about the sources of natural gas in British Columbia and the benefits of its renewable natural gas supply. The plaintiffs take issue with Fortis' claims that using its gas products is less expensive than using electric heat pumps. Further, the plaintiffs disagree that the use of natural gas, including renewable natural gas, aligns with provincial climate change targets. The plaintiffs allege that these representations are untrue and have the capability, tendency, or effect of deceiving or misleading consumers.

The plaintiffs seek three main remedies under the BPCPA: a declaration that Fortis has engaged in a deceptive act or practice; an injunction prohibiting Fortis from making alleged misrepresentations about its gas products and services; and an order that Fortis issue corrective advertisements. While the plaintiffs are not seeking monetary damages, they seek to set precedents for other gas companies around the world.

Bill C-59: Key takeaways and practical considerations for businesses

With the onus being shifted to the advertiser, the uncertainty on what the phrases "business or business activity" and "adequate and proper substantiation in accordance with internationally recognized methodology" mean, as well as the increased risk of enforcement with the impending introduction of private rights of action, advertisers should tread carefully.

Businesses need to think critically about how they meet consumer demand for environmental action, while not having their environmental claims used against them. Greenwashing claims against businesses are becoming increasingly sophisticated and prevalent. Even if a complaint does not result in a penalty, businesses can still face reputational risk and incur costs in responding to the complaint.

To learn more about how to manage your risk from allegations of greenwashing, please reach out to any of the authors or key contacts listed below.

Footnote

[1] CBC News, *CBC News*, "Canada's Competition Bureau investigating Lululemon's green claims, non-profit says" (May 6, 2024); Brenna Owen, *The Canadian Press*, "Group says Lululemon is 'greenwashing' as emissions rise, wants competition probe" (February 12, 2024).

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