Bill C-59 Enacted: New Laws Targeting Greenwashing

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Bill C-59 passed the third reading at the Senate without amendments on June 19, 2024 and received royal assent on June 20, 2024. The enactment of Bill C-59 represents a significant shift in Canada's regulatory landscape for environmental claims.

The perils of "greenwashing"

Bill C-59 introduces key amendments to Section 74.01 of the *Competition Act* (Canada) (**Act**) to address "greenwashing" – false, misleading, or deceptive environmental claims made for the purpose of promoting a product or a business interest. These provisions will have a significant impact on how companies market and promote their efforts to reduce their environmental footprint and address global climate change causes and effects. While not specifically targeted at the oil and gas industry, climate advocacy groups have long been critical of environmental claims made by the oil and gas sector on the basis that investment in fossil fuel production is inconsistent with reaching global climate goals.

The new provisions – testing, substantiating and the reverse onus

The new provisions of the Act target environmental claims that promote the environmental, social and ecological benefits of using or supplying a product if the claim is not based on an adequate and proper test (Section 74.01(1)(b.1)), and more broadly, environmental claims that promote the environmental and ecological benefits of a business or business activity that are not based on adequate and proper substantiation in accordance with internationally recognized methodology (Section 74.01(1)(b.2)).

While the facts cited in the environmental claim must be appropriately tested or substantiated, that may not be enough. If the over-all impression of the claim to an average person implies a broader meaning, the implied broader meaning must also be tested or substantiated.

Both sections place the burden of proof on the entity making the environmental claim to demonstrate compliance with the provision.

Adequate and proper test

There is fairly clear case law on what is required to qualify as an "adequate and proper test". The test must be fit and suitable having regard for the risk or harm the product in question intends to prevent and be conducted in controlled conditions that exclude external variables. When feasible, multiple independent samples should be used, and the results must reasonably show the product's significant effect. This test must be completed before making any related statements, warranties, or guarantees.

Adequate and proper substantiation in accordance with internationally recognized methodology

There is currently no case law on what is required to satisfy "adequate and proper substantiation in accordance with internationally recognized methodology". The term "internationally recognized methodology" is undefined in the Act. Various international, national, and sub-national standards exist, with some being voluntary and others being mandatory. As a result, the scope and meaning of Section 74.01(1)(b.2) is unclear. Further guidance from Canada's Competition Bureau and the Competition Tribunal is required.

Why are Companies Concerned?

The uncertainty and ambiguity of the phrase "internationally recognized methodology" is particularly concerning to companies for a number of reasons, including the imposition of significant monetary penalties, private rights of action that will provide climate advocacy groups with direct access to the Competition Tribunal to make claims, and potential conflicts with disclosures required by securities laws.

Administrative Monetary Penalties

First, Bill C-59 introduces significant new monetary penalties for violation of these provisions. An administrative monetary penalty (**AMP**) can be assessed against a corporation for the greater of $10 million for the first order and $15 million dollars for any subsequent order, and 3% of the corporation's annual worldwide gross revenues.

Private Rights of Action

Second, Bill C-59 introduces private rights of action (i.e. an action advanced by a person, as opposed to one advanced by the Commissioner). Private rights of action have been deferred for one year, although as of June 20, 2025, private actions can be commenced based on environmental claims made (or which continue to be made) as of June 20, 2024. Complaints will be made directly to the Competition Tribunal, which has the discretion to accept and adjudicate an action where it considers it "in the public interest" to allow the action to proceed.

We fully anticipate that advocacy groups will make widespread use of the private rights of action to help shape the scope and meaning of these provisions using a narrative similar to the following one adopted by the United Nations Climate Action group: "[g]reenwashing presents a significant obstacle to tackling climate change. By misleading the public to believe that a company or other entity is doing more to protect the environment than it is, greenwashing promotes false solutions to the climate crisis that distract from and delay concrete and credible action".[1]

Potential Conflicts with Securities Laws

Finally, for public companies, it is unclear how potential conflicts between the new provisions and environmental disclosures required to be made pursuant to applicable securities laws will be addressed.

Key Takeaways & Next Steps

Given the risks associated with potential violations of these provisions, which we have noted above, many Canadian oil and gas companies have temporarily removed or paused communications about their environmental and sustainability activities and goals from their websites (including those contained in investor presentations as well as ESG and sustainability reports) pending further guidance from the Competition Bureau. Others have placed additional "click-through" disclaimers on their websites that indicate that, due to changes to the Competition Act, the information is disclaimed and does not constitute an "active representation".

As we wait for further guidance from the Competition Bureau, we are working with our clients to help them understand the types of environmental claims that the new legislation has the potential to target. For example:

- it is important to understand how the "over-all impression" test is applied since testing or substantiating facts alone may not be enough.
- The use of words and phrases, particularly by oil and gas companies, such as "**clean**", "**sustainable**", "**green**", "**low-carbon**", "**climate leader**", "**carbon neutral**", "**climate friendly**" and "**net-zero**" are particularly problematic given that they are fairly broad and vague terms that can mean different things to different people. These words will invite greater scrutiny as the meaning they imply or portray will be difficult to substantiate.

[1] Greenwashing – the deceptive tactics behind environmental claims | United Nations.

- Greater care will need to be taken by companies that wish to disclose their future plans and targets. Referred to as "forward looking statements", these statements are particularly vulnerable to attack unless the plan is detailed, clear and actionable, appropriate baseline measures and methodologies are in place to measure progress, the resources and technologies are effective and commercially available today, and there is evidence of action being taken and monitored.

If you would like more information and guidance about how these new provisions may affect your business, please contact any member of our **Competition & Foreign Investment Law Group** or our **Business Law Group**.