

Response to the Public Consultation on the Competition Act's New Greenwashing Provisions

CONSULTATION SUBMISSION

September 2024



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Abstract

A response to Innovation, Science and Economic Development's call for consultation on the *Competition Act's* new 'greenwashing' provisions.

Keywords: greenwashing, consumer protection, environment

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Version: 2024-09-16-3:19:27 PM EDT

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Table of Contents

Summary	5
Introduction	7
Feedback about the new provision of the law relating to statements, warranties or guarantees of a product or service’s environmental benefits	11
What kinds of claims about environmental benefits are commonly made about products or services in the marketplace? Why are these claims more common than others?	11
Are there certain types of claims about environmental benefits of products or services that are less likely to be based on adequate and proper testing? Is there something about those types of claims that makes them harder to test?.....	13
What should the Bureau consider when it evaluates whether testing to support claims about the environmental benefits of products or services is “adequate and proper”?.....	14
What challenges may businesses and advertisers face when complying with this provision?.....	15
What other information should the Bureau be aware of when thinking about how and when to enforce this provision?	16
Feedback about the new provision of the law relating to representations made about environmental benefits of businesses and business activities	17

What kinds of claims about environmental benefits are commonly made in the marketplace about businesses or business activities? Why are these claims more common than others?.....17

Are there certain types of claims about the environmental benefits of businesses or business activities that are less likely to be based on “adequate and proper substantiation in accordance with internationally recognized methodology”? Is there something about those types of claims that makes them harder to substantiate?.....18

What internationally recognized methodologies should the Bureau consider when evaluating whether claims about the environmental benefits of the business or business activities have been “adequately and properly substantiated”? Are there limitations to these methodologies that the Bureau should be aware of?.....18

What other factors should the Bureau take into consideration when it evaluates whether claims about the environmental benefits of businesses or business activities are based on “adequate and proper substantiation in accordance with internationally recognized methodology”?.....19

What challenges may businesses and advertisers face when complying with this new provision of the law?.....19

What other information should the Bureau be aware of when thinking about how and when to enforce this new provision of the law?.....19>

Summary

The Competition Bureau should:

- follow the lead of competition authorities in other advanced economies to develop comprehensive guidelines and principles for environmental labelling and advertising for businesses and consumers.
- lead in the response to greenwashing by taking a ‘whole of government approach’ as opposed to concentrating on the enforcement of one narrow prohibition in the *Competition Act*.
- utilize all the legislation it administers and enforces to provide efficient and effective enforcement when needed.
- take advantage of expertise from businesses, civil society, environmental groups, consumer organizations, standards development organizations, and others to develop guidelines and a comprehensive, transparent compliance policy for anti-greenwashing.

Introduction

Consumers Council of Canada is pleased to present the following submission in response to the request by the Minister of Innovation, Science and Industry and the Competition Bureau consultation on guidance for the administration and enforcement of amendments to the *Competition Act* to address false and misleading claims pertaining to the environmental benefits of products, services and businesses.

The Council is a national, non-profit, voluntary organization, founded in 1994, that works toward an improved marketplace for consumers in Canada. It seeks an efficient, equitable, effective and safe marketplace in which consumers can fully exercise their rights and responsibilities.

For many years Council members and other Canadian stakeholders from the business, government, academia, and standards and technical communities have been actively engaged in the development of national and international standards that provide principles and requirements for communicating environmental aspects and environmental impacts of products and services through environmental statements.

The Council is pleased that Innovation, Science and Economic Development (ISED) and the Competition Bureau have re-discovered their potential role in

curbing false and misleading representations regarding environmental benefits of products, services, and business activity.

Before proceeding with responses to the consultation questions, the Council wishes to express its concern with the elementary nature of the questions. These are questions that should have been addressed long before the legislation had been designed, debated and enacted. In addition, the Council questions the strategy of attempting to fit all representations regarding environmental benefits in a similar category of 'product performance claims' where it is assumed there is an 'adequate and proper' test available to justify most claims. Other means of demonstrating due diligence such as supporting data, alignment with findings of credible academic or scientific studies, conformity to third-party verification processes, could be sufficient evidence that the claim is accurate and not misleading by general impression or materially.

The Council is also concerned that resources ISED and the Competition Bureau are willing to devote to this important subject will be sufficient and will rely on a simple command and control regime. By contrast, the U.S. Federal Trade Commission has recently completed an extensive public comment exercise, beginning in October 2022, on proposed amendments to their "Green Guides".¹ The proposal for the new EU "green claims" directive² was publicly available for comment for over a year before coming into effect in the spring of 2024.³

Further, there is very little available information in the documentation provided by the Competition Bureau on what efforts will be made to monitor and enforce these new provisions on misleading environmental claims. Without

¹ Federal Trade Commission, "Green Guides," Government Regulatory, United States Government, Undated, <https://www.ftc.gov/news-events/topics/truth-advertising/green-guides>.

² European Commission, "Green Claims," Government, European Commission, Undated, https://environment.ec.europa.eu/topics/circular-economy/green-claims_en.

³ European Commission, "Directive of the European Parliament and of the Council on Substantiation and Communication of Explicit Environmental Claims" (European Commission, March 22, 2023), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023PC0166>.

a plan for monitoring and enforcement, consumers have very little confidence in new legislation.

Finally, there appears to be no linkage between the new provisions of the *Competition Act* and the plans of Environment and Climate Change Canada to draft and enforce strict environmental labelling regulations for plastics to support Canada's participation in a Plastics Treaty. Awareness of policies and legislation of other federal and provincial governments regarding appropriate environmental claims is necessary to prevent contradictory advice to business and consumers and encourage a 'whole of government' approach to anti-greenwashing.

Feedback about the new provision of the law relating to statements, warranties or guarantees of a product or service's environmental benefits

1. What kinds of claims about environmental benefits are commonly made about products or services in the marketplace? Why are these claims more common than others?

Council members and other Canadian stakeholders from the business, government, academic, standards and technical communities have been actively engaged in the development of the ISO 14020 family of standards since this work began in 1993. At that time, Canada was a leader in this area – our National Standard for Environmental Claims became the “seed” document for the development of an ISO standard for self declared claims. Canada was the second country to have a national eco-logo programme when Environmental Choice was launched 5 years after the German Blue Angel programme.

ISO 14020 provides principles and requirements for communicating environmental aspects and environmental impacts of products through

environmental statements. The 14020 series includes ISO 14021 - self-declared environmental claims, ISO 14024 - ecolabels, ISO 14025 - environmental product declarations and ISO 14026 - footprint communications. These standards have been adopted by governments around the world as guidelines and, in some cases, incorporated by reference as regulations.⁴

Since early 2000, the Competition Bureau and other federal government departments adopted CSA ISO 14021 as their key guidance document for Canadian business and consumers. In addition to a lot of generic guidance on making claims that are not misleading, this document identifies several claims commonly found in the marketplace and provides guidance on how to present the claim, pitfalls to avoid when making the claims and how to substantiate the claims. It includes a very large bibliography of standard tests for some of the claims. The Bureau archived the document “Environmental Claims – a Guide for Industry and Advertisers” in 2022.⁵

Council members and other Canadian expert volunteers continue to work in leadership roles to review and revise these international standards that address common environmental claims made about products or services in the marketplace. These standards would be excellent documents for the Bureau to utilize as benchmarks when evaluating environmental claims and statements of all kinds.

Recent revisions to these standards have expanded their scope to make them more effective tools in addressing the U.N. Sustainable Development Goals (SDGs).⁶ These standards now also address claims

⁴ ISO, *Environmental Labels* (Geneva: ISO, 2019), <https://www.iso.org/files/live/sites/isoorg/files/store/en/PUB100323.pdf>.

⁵ Competition Bureau, “Environmental Claims: A Guide for Industry and Advertisers,” Government of Canada, June 25, 2008, <https://competition-bureau.canada.ca/environmental-claims-guide-industry-and-advertisers>.

⁶ Department of Economic and Social Affairs, Sustainable Development, “The 17 Goals,” United Nations, 2024, <https://sdgs.un.org/goals>.

that cover related social and economic aspects in addition to the core environmental claim. In addition, ISO has developed a technical report to provide principles and requirements for Ethical Claims and Supporting Information – ISO TR 17033.⁷

2. Are there certain types of claims about environmental benefits of products or services that are less likely to be based on adequate and proper testing? Is there something about those types of claims that makes them harder to test?

Many of the most common claims currently found in the marketplace cannot be verified with a “test” – they require data and calculations. The data must be available, in the same way that a test result must be made available, to meet transparency requirements. These data and calculations cannot be concealed using the excuse that they are “confidential business information (CBI)”. Business concerns about CBI can be addressed by using a third party to audit and verify the data to be supplied to the Competition Bureau to support a claim. For SMEs, this data can be checked by their chosen auditor, along with company financial information. The Bureau should be clear on these options to provide predictability to industry.

Claims of recycled content cannot be tested for verification. They require data on the chain of custody of the material claimed as recycled content and the attribution method (such as mass balance). Verifying the validity of these claims will require the Bureau to develop or have access to the expertise necessary to check this data.

‘Recyclable’ is another claim that cannot be confirmed by testing and, given the variations in local recycling programmes, it is very difficult to check if anything claiming to be recyclable can actually be recycled by a “reasonable percentage” of the population where the product is sold. The

⁷ ISO, “Ethical Claims and Supporting Information — Principles and Requirements,” 03.120.20 (Geneva: ISO, August 2019), <https://www.iso.org/standard/29356.html>.

Council suggests that the Bureau consult with Environment and Climate Change Canada to access the results of their research in measuring recyclability for the purpose of labelling plastics for their waste plastic strategy.⁸

In addition to the problems with measuring recyclability, a claim of recyclable may not actually reflect an environmental benefit over the entire life cycle of the product.

Other claims, like repairability, extended life, reduced resource use, energy saving, etc. are also dependent on company or industry data for verification, which will require the Bureau to design a system for checking these and making it publicly available. This would give industry some certainty and predictability and consumers some confidence in the credibility of the claims.

3. What should the Bureau consider when it evaluates whether testing to support claims about the environmental benefits of products or services is “adequate and proper”?

The Bureau should first use the same criteria of general impression and materiality that it uses to examine any claims for false and misleading representations before determining evidence of which tests for which claims are ‘adequate and proper’. In many if not most cases there will not be a standardized test available and the Bureau will need to use its own judgement about adequacy and properness of any testing. In these cases, the Bureau should be transparent with business and the public with their findings to guide and assist those using the same or similar claims. An evergreen publication of guidance, rulings and interpretations would be useful in this case.

⁸ Environment and Climate Change Canada, “Consultation Paper: Towards Canada-Wide Rules to Strengthen Recycling and Composting of Plastics through Accurate Labelling” (Government of Canada, July 2022), <https://www.canada.ca/en/environment-climate-change/services/canadian-environmental-protection-act-registry/consultation-rules-recycling-composting-plastics-labelling.html>.

The ISO standards include bibliographies of available standards that can be used to verify environmental claims. These would be a useful reference for the Bureau. In addition to the bibliography, the standards have a general hierarchy on how to select tests to be used: “Assessment methods shall follow, in order of preference, International Standards, recognized standards that have international acceptability (these may include regional or national standards) or industry or trade methods which have been subjected to peer review.” The Bureau should set a similar hierarchy to provide predictability to those making claims.

4. What challenges may businesses and advertisers face when complying with this provision?

Detailed guidance from the Bureau with many examples – similar to what is offered by the U.S. Federal Trade Commission's Green Guides⁹ – would greatly mitigate challenges for Canadian businesses and help inform consumers. In addition, the closer the Bureau guidelines follow those of the FTC, the better it will be in reducing challenges in cross-border trade of consumer goods and services where environmental claims are routinely used.

Businesses may also face a challenge in connecting their advertising departments with their research and development sectors due to the difference in knowledge base required for different outcomes. For SMEs, understanding the life cycle of a product may also be a challenge that causes them to mistakenly make a misleading claim. A claim can also be false and misleading not because of what it says so much as what it does not say. Environmental and ethical claims need to be as transparent about what they do *not* cover as about what they are claiming. For example, if a product claims to not be tested on animals, does this claim cover all the parts or ingredients or only the final product?

⁹ Federal Trade Commission, “Green Guides,” Government Regulatory, United States Government, Undated, <https://www.ftc.gov/news-events/topics/truth-advertising/green-guides>.

The option of using a third-party programme to verify an environmental claim is costly for business – a cost which is ultimately passed on to consumers. Some third-party programmes lack rigour and transparency and may only add to the problems of false and misleading claims in the marketplace.

5. What other information should the Bureau be aware of when thinking about how and when to enforce this provision?

Consumers and business competitors would most appreciate the Bureau first addressing the egregious cases where environmental claims are obviously false and misleading, where no efforts have been made to provide evidence that claims are true, and where there is considerable potential detriment to consumers and competitors.

Council also recommends that the Bureau take full advantage of enforcement powers under its regulatory statutes – *Consumer Packaging and Labelling Act*, *Precious Metals Marking Act*, and *Textile Labelling Act*. These statutes also prohibit false and misleading representations but, unlike the *Competition Act*, allow the Bureau to execute warrantless entry to inspect, search, review documents and take immediate enforcement action without entering protracted negotiations involved in consent agreements and prosecutions. Greater use of these statutes in curbing false and misleading environmental claims also allows the Bureau to be more proactive in their enforcement approach and compliment ongoing handling of business and consumer complaints.

Feedback about the new provision of the law relating to representations made about environmental benefits of businesses and business activities.

1. What kinds of claims about environmental benefits are commonly made in the marketplace about businesses or business activities? Why are these claims more common than others?

Businesses in some sectors such as construction, forestry and mining commonly make claims that they are compliant with specific environmental management systems.

Several of these systems are operated as third-party programmes and often internationally recognized with good transparency, strong criteria, and a requirement for internal and external audits and data retention.

Private, third-party programmes also exist that operate in a similar manner to offer companies or industry sectors the certified transparency

and accountability necessary to claim environmental benefits of their business activity.

Recently, businesses have begun making claims about their records in achieving criteria for Environmental, Social and Governance (ESG) programmes.

ESG is a comparatively new type of business environmental claim. ESG claims are widely used in the stock market but less so in the regular consumer marketplace. To make a valid ESG claim, a company would need a well-documented and audited management system with transparent criteria for all items covered by their claims and a transparent declaration of what is not included.

2. Are there certain types of claims about the environmental benefits of businesses or business activities that are less likely to be based on “adequate and proper substantiation in accordance with internationally recognized methodology”? Is there something about those types of claims that makes them harder to substantiate?

Claims that a business adheres to an Environmental Management System would be the most straightforward to verify, because these systems are accepted internationally for businesses of all sizes and access to data and audit reports are relatively easy to access.

ESG claims are more complex to assess due to the multiple benefits being claimed (not just environmental) and the variability of ESG standards.

3. What internationally recognized methodologies should the Bureau consider when evaluating whether claims about the environmental benefits of the business or business activities have been “adequately and properly substantiated”? Are there limitations to these methodologies that the Bureau should be aware of?

See prior responses. Much depends on the industry or business sector and international standards that apply to them.

4. What other factors should the Bureau take into consideration when it evaluates whether claims about the environmental benefits of businesses or business activities are based on “adequate and proper substantiation in accordance with internationally recognized methodology”?

Special consideration should be given to factors unique to Canada that impact environmental claims, such as our extreme climate, multiple eco-zones, our natural resources-based economy, and low-density populations. Benchmarking green marketing guidelines and enforcement approaches from other countries such as the Australian Competition and Consumer Commission and the U.S. Federal Trade Commission would be an ideal strategy.

5. What challenges may businesses and advertisers face when complying with this new provision of the law?

Employing due diligence to ensure environmental claims are accurate and not misleading should be no different from any other claim companies use to promote their products, services or business in their marketing plans and activities. However, since the Bureau has developed specific legislation on this subject, standard due diligence may not be enough. For this reason the Bureau will need to be transparent in its rulings and interpretations and guidance to ensure those who wish to comply with the new legislation will be able to do so knowing there is some consistency in interpretation and application of the law.

6. What other information should the Bureau be aware of when thinking about how and when to enforce this new provision of the law?

The marketplace is cluttered with misleading environmental claims about products, services and businesses. Some misleading claims may be due to mistakes, simply mirroring claims made by competitors, or an incomplete understanding of ‘burden shifting’ – making an environmental improvement somewhere that makes things worse somewhere else.

The Bureau needs to consider how little guidance is publicly available to help industry avoid making misleading environmental claims and how

consumers can avoid being misled. This requires thinking through all stages of the compliance continuum and engaging Canadian and foreign stakeholders.

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