Deceptive Marketing Provisions Continue To Be Enforcement Priority

Canada's deceptive marketing practices regime has been the subject of incremental change since 2022 to strengthen the enforcement stance against deceptive marketing. The civil enforcement of the deceptive marketing practices provisions includes substantial monetary penalties and, commencing in June 2025, a new private right of access to the Competition Tribunal (Tribunal), albeit without the ability to seek financial relief beyond the traditional restitution remedy (which is only available in certain cases, and is not available for the new greenwashing provisions). Enforcing the deceptive marketing practices provisions of the *Competition Act* (Act) is an enforcement priority for the Competition Bureau (Bureau), with a particular focus on price representations and environmental claims.

The Commissioner of Competition (Commissioner) has advised that the Bureau will "[c]ontinue to crack down on deceptive marketing practices in relation to environmental claims ("greenwashing") and junk fees in the form of drip pricing."[1] As such, businesses should ensure that they understand the heightened risks associated with their marketing efforts and update their compliance efforts accordingly.

Spotlight on 'greenwashing'

In recent years, consumers have become more environmentally conscious and frequently seek products and services that are environmentally friendly – "clean," "green" or "sustainable." In response to this demand, it has become increasingly common for businesses to promote their products or services with claims about their environmental aspects and impacts. When these environmental claims are misleading or unsubstantiated, businesses are considered to be engaging in "greenwashing" and expose themselves to liability under the deceptive marketing provisions of the Act.

The Bureau, consistent with actions by antitrust, securities and other enforcers and regulators around the world, has already taken enforcement action against greenwashing and commenced several inquiries and investigations into environmental claims. To date, such Bureau enforcement action has been based on a breach of the general misrepresentation provision of the Act, which exposes businesses to liability where

- they make a representation to the public that is false or misleading in a material respect
- they make a performance claim, being a representation to the public in the form

of a statement, warranty or guarantee of the performance, efficacy or length of life of a product, that is not based on an adequate and proper test

Now, environmental representations or claims may also be challenged under two new specific provisions. Under these new provisions, businesses (rather than the Commissioner or a private litigant) bear the onus of being able to prove, on a balance of probabilities, that

- 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" is based on an adequate and proper test
- any representation 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" is based on adequate and proper substantiation "in accordance with internationally recognized methodology"

Notably, these new provisions do *not* require the applicant to also establish that the representation is materially false or misleading in any respect.

Importantly, the Act has always required that performance claims (including statements, warranties or guarantees) be substantiated by adequate and proper tests and the Bureau has investigated and has ongoing investigations regarding environmental performance claims. There have been several cases over the years where the courts have considered advertising of all kinds of different performance claims and whether the claims could be said to be based on "adequate and proper" testing.[2] The change arising from these new provisions is that environmental claims regarding the benefits of a business or business activities must be substantiated by an "adequate and proper test" in accordance with an "internationally recognized methodology". This standard is undefined in the new amendments. However, it is notable that during the Senate debates just prior to royal assent, certain senators remarked that while the expression "internationally recognized methodology" may appear vague, the words should be interpreted in accordance with their ordinary meaning. It was also commented that an analysis of a representation should consider federal and other Canadian best practices, such as those set out by Environment and Climate Change Canada.[3] Moreover, the Bureau has committed to consult with stakeholders and to release guidance[4] to provide a predictable framework for purposes of assessing the substantiation of environmental claims.

In the interim, businesses will have to grapple with a degree of uncertainty, though the Act continues to include an explicit due diligence defence in section 74.1(3). As has been the case before the amendments, it is critical that businesses making claims or representations relating to concepts such as "sustainability," "net-zero" and "carbon-neutral" are doing so in a manner that is consistent with the most recent evidence and methodologies of independent third-party organizations with well recognized expertise in the appropriate field. Wherever possible, when making environmental representations, businesses should clearly disclose the substantiation source(s) that provide support for the claim. Businesses should also prioritize compliance efforts and begin taking proactive measures to address potential risks with existing representations and claims.

OSP: shifting legal burden places premium on compliance records

The "ordinary selling price" (OSP) provisions of the deceptive marketing regime are designed to prevent suppliers from taking advantage of consumers through the false promise of savings. The OSP provisions ensure that suppliers (typically retailers) do not mislead consumers by referring to inflated prices as the "ordinary" or "regular"

selling price of a certain product and then suggest a discount. They also ensure that retailers do not mislead consumers by falsely claiming that their own prices (for a specific product or in general) are lower than those offered by competitors in the market.

The OSP is the regular price at which a product is commonly offered for sale, either by (a) the supplier, where the supplier is suggesting that its products are on sale or being offered at a discount, or (b) the other competitors in the market, where the supplier is suggesting that its prices are cheaper than competing retailers' prices for the same product. Establishing the OSP is typically the most critical element when assessing compliance with these provisions.

The Act requires that where a supplier advertises a discount on its product, the reduced price should be compared to the product's OSP, and not an artificially inflated regular price to create the illusion of larger savings. While the Act does not prescribe specific time periods, according to the Bureau's guidance, the OSP can be established through the application of either

- *the volume test*, under which the OSP is the price or a higher price at which the business sold a substantial volume of the product (usually 50% of the product) within a reasonable period of time (usually 12 months, but it can be less depending on the particular context)
- *the time test*, under which the OSP is the price or a higher price at which the business offered the product for sale, in good faith, for a substantial period of time (usually 6 months, though this is also context-dependent and can be shorter)

For a supplier to promote its prices as lower in comparison to those charged by other suppliers in a market, the Bureau's guidance indicates that competitors in the relevant market must have either (a) sold a substantial volume of the product (usually 50% or more) at the higher price within a reasonable period of time (usually 12 months) before or after making the representation, or (b) offered the product for sale at the higher price in good faith for a substantial period of time (usually six months) before or after making the representation.

Prior to June 20, 2024, the Commissioner had the burden in any proceedings under these provisions to establish the supplier's OSP. This burden has now shifted to the supplier, who now has the onus of proving, on a balance of probabilities, the OSP of a product using the tests discussed above.

Businesses should carefully review their internal OSP compliance programs and ensure that appropriate record-keeping practices are implemented, which will allow them to demonstrate clearly and quickly that the OSP being represented is genuine and compliant with the Act.

Clarification on drip pricing

Drip pricing is a deceptive pricing strategy where a company only advertises part of a product's price upfront and reveals additional costs as the consumer goes through the purchasing process. As a result of additional fees that "drip" into the final purchase price, the initially advertised price is unattainably low and, therefore, misleading to consumers. This has been an area of active enforcement by the Bureau.

In June 2022, the practice of "drip pricing" was expressly codified as misleading under the criminal and civil deceptive marketing provisions. This change obviated the need for the Commissioner to establish that such practices are misleading in each case, though other elements of the provision still need to be established.

The 2022 amendments expressly excluded obligatory fees imposed by law from the scope of fees that would be subject to drip pricing provisions. This was interpreted by some as creating an exemption allowing suppliers to pass on fees imposed by the government by law on the supplier without disclosing such fees. The latest amendments strengthen the drip pricing provisions to clarify that only fixed, mandatory amounts imposed by law directly on *the purchaser of a product*, such as sales tax, can be excluded from the advertised price. Accordingly, it is now clear that a supplier seeking to pass on fees or amounts imposed by the government on purchasers of its products cannot exclude any such fees or amounts from the advertised price. As described by the Commissioner, this change is intended to "close a potential loophole in the 'drip pricing' provision and guard against the unintended proliferation of junk fees."[5]

Since June 2022, the Bureau has already brought a case before the Tribunal under the new provision, alleging that Cineplex engaged in drip pricing when selling movie tickets online.[6] The hearing concluded in February 2024, and the Tribunal decision is pending. The Bureau also reached a settlement with TicketNetwork regarding concerns over drip pricing and other misleading claims in reselling tickets online, requiring the company to pay an $825,000 penalty and to cease all deceptive marketing practices.[7] Most recently, in June 2024, the Bureau reached a settlement with SiriusXM Canada to resolve drip pricing concerns regarding subscription price representations, which included the payment of a $3.3-million penalty.[8] These cases follow several other drip pricing enforcement actions that were brought before drip pricing was explicitly referenced in the Act.

Consequences of non-compliance

Where the Tribunal or a court finds that a business has violated the Act's deceptive marketing provisions, it has the discretion to issue a broad range of remedial orders, including an order or combination of orders

- prohibiting the reviewable conduct, being the representation or unsubstantiated claim in question and similar representations and claims
- requiring the publication of corrective notices
- imposing monetary penalties, payable to the government (not to private parties), of up to the greater of $10 million for the first order (and $15 million for each subsequent order) and three times the value of the benefit derived from the agreement (or, if that amount cannot be reasonably determined, 3% of the person's annual worldwide gross revenues) for businesses
- requiring the payment of restitution to those who purchased the products at issue (only available for orders relating to violations of the general prohibition against materially false or misleading representations; this is not available for breach of either of the two new greenwashing provisions)

Currently, interim orders are only available to the Commissioner, but effective June 20, 2025, interim orders will also be available to private applicants. As such, private litigants (with leave) will be able to compel a business to cease or alter their marketing campaigns before a full hearing on the merits can be held.

Importantly, unlike the situation with other civil reviewable trade practices, the new remedy of monetary relief from the Tribunal will not be available under the civil deceptive marketing practices provisions. Instead, once the private access regime comes into force on June 20, 2025, private litigants bringing applications under the civil provisions will be limited to the traditional restitutionary remedy, which is only available for violations of the general prohibition against representations that are false or misleading in a material respect. (Notably, this remedy is not available

for other deceptive marketing practices, including the two new greenwashing provisions discussed above.) However, as noted below, private parties already have the ability to obtain monetary relief in the form of damages where a private litigant can demonstrate a breach of the criminal provisions or an actionable misrepresentation at common law or under provincial consumer protection statutes.

Potential for increase in private actions

Each year, the Bureau receives thousands of complaints – both informal and formal (via the section 9 regime of the Act) – regarding alleged deceptive marketing practices. For example, in 2022–23, the Bureau received nearly 6,000 complaints relating to deceptive marketing over a 12-month period, accounting for more than 90% of the total complaints received.[9] While these facts illustrate that deceptive marketing is an area of significant public concern and an enforcement priority for the Bureau, the sheer volume of annual complaints highlights that the Bureau cannot investigate all of them in a timely manner.

To date, under the Act, private parties can only commence an action for damages on the basis that the alleged misrepresentation amounts to a violation of the criminal deceptive marketing practices. While private parties have no right of action under the civil deceptive marketing provisions of the Act, they can pursue claims for damages and other relief in respect of false and misleading representations at common law and under provincial consumer protection legislation. Over the years, private plaintiffs, including class action plaintiffs, have pursued such claims with some success.

As discussed in section *The expansion of private enforcement* of this guide on the expansion of private enforcement under the Act, as of June 20, 2025, private parties able to satisfy the Tribunal or a court that it is in the "public interest" to grant them leave will now be able to challenge deceptive marketing practices under the civil provisions themselves. Given the existence of a well established avenue to pursue monetary relief from the courts in respect of deceptive marketing practices, the lack of availability of additional monetary awards payable to private litigants under the Act's new right of private action combined with the public-interest leave test, it is unclear whether this change will open the door to a wave of new litigation before the Tribunal. In terms of possible early private litigants, environmental justice groups such as Ecojustice and Greenpeace have long been pursuing businesses by lodging formal complaints with the Bureau regarding environmental claims. These groups were also active in making submissions before Parliament on the new environmental claims provisions. Once the new private access regime comes into force on June 20, 2025, these groups (assuming they obtain public-interest leave) will be able to file and litigate their applications for remedies directly and on their own terms. As a result, the resource-strapped Bureau may soon be eclipsed by private plaintiffs and public-interest organizations as the primary enforcer of greenwashing complaints in Canada.

Footnotes

1. Competition Bureau Canada, "2024-2025 Annual Plan – Onwards and upwards: Strengthening competition for Canadians" (30 April 2024).

2. See, e.g., *Canada (Commissioner of Competition) v. Imperial Brush Co,* 2008 Comp Trib 2, at para 128.

3. "Bill C-59, An Act to implement certain provisions of the fall economic statement tabled in Parliament on November 21, 2023 and certain provisions of the budget tabled in Parliament on March 28, 2023" [PDF], 3rd reading, *Debates of the Senate (Hansard),* 44-1, 153, No. 214 (18 June 2024) at 6736.

4. Prior to the 2022 amendments, the Bureau had been working on new guidance for environmental claims as it archived its 2008 environmental claims guidance developed with the Canadian Standards Association (Competition Bureau Canada, "Environmental Claims: A Guide for Industry and Advertisers" (25 June 2008).

5. Competition Bureau Canada, "Brief to the House of Commons Standing Committee on Finance and the Senate Standing Committee on National Finance" [PDF] (1 March 2024).

6. Competition Tribunal, "Case Details: *Commissioner of Competition v. Cineplex Inc.*".

7. Competition Bureau Canada, "TicketNetwork to pay $825,000 penalty to settle misleading advertising concerns in the ticket resale market" (21 November 2023).

8. Competition Bureau Canada, "Sirius to pay $3.3 million penalty to settle concerns over subscription price advertising" (5 June 2024).

9. Competition Bureau Canada, "Competition Bureau Performance Measurement & Statistics Report 2023-2024" (28 March 2024).

Authors: Shuli Rodal, Christopher Naudie, Danielle Chu, Zach Rudge, Michelle Lally, Adam Hirsh, Chelsea Rubin, Graeme Rotrand, Kaeleigh Kuzma, Alysha Pannu, Reba Nauth

Osler, Hoskin & Harcourt LLP