

FEBRUARY 28, 2025

Consultation on Proposed Guidelines on *Environmental Claims and the Competition Act*

Submission of Davies Ward Phillips & Vineberg LLP

Davies Ward Phillips & Vineberg LLP (Davies) is pleased to provide this submission to the Competition Bureau (Bureau) in response to its December 2024 draft guidelines, *Environmental Claims and the Competition Act*.

The Davies Competition group is recognized as a leader by clients, peers and third-party organizations. We represent a wide range of domestic and international clients, provide strategic advice and representation on a wide variety of competition-related matters and have significant experience advising in the misleading advertising area. We also work closely with our leading Environmental group to assist clients in making environmental claims that are truthful, specific and clear.

The views expressed in this submission do not necessarily reflect the opinions of any particular client of Davies.

While ensuring accurate environmental claims is a laudable goal, unclear standards risk deterring businesses from informing the public of their efforts to achieve environmental goals. Ultimately, if businesses are deterred from such communications, they may have less incentive to undertake such efforts and to compete on the basis of their environmental initiatives. Our comments are focused on certain aspects of the draft guidelines where more detailed guidance would be helpful.

Comments

Greater clarity on the concept of "internationally recognized" methodology required for substantiation of certain claims would be helpful.

The new requirement in section 74.01(1)(b.2) that certain environmental claims require substantiation "in accordance with internationally recognized methodology" warrants clarification. We welcome the indication in the draft guidelines that the Bureau "will likely consider a methodology to be internationally recognized if it is recognized in two or more countries." That said, at a minimum, it would be helpful to clarify that one of those two countries can be Canada.

It is also helpful that the draft guidelines acknowledge that the *Competition Act* (Act) does not require recognition of the methodology by governments in two or more countries and further acknowledge that a methodology developed by an industry and recognized in two or more countries will meet the "internationally recognized" requirement.

While section 74.01(1)(b.2) does not restrict how recognition of a methodology needs to be expressed or evidenced or by whom, it would nevertheless be helpful for the Bureau to provide some non-exhaustive examples of what it would accept as recognition for the purposes of this section, such as endorsement, acknowledgement, adoption or utilization by associations of professionals, industry organizations, standards boards, government entities or academic organizations.

Along these lines, one of the questions in the FAQ section helpfully provides that "if the standard that contains the methodology is internationally recognized, then the Bureau will likely consider the methodology to be internationally recognized." Similarly, the FAQ indicates that:

"There are a number of different standards to help businesses learn how to meet the challenge of reaching net-zero. Many can offer adequate and proper substantiation in accordance with methodologies that are internationally recognized for supporting such claims."

As we understand that international standards may play an important role in supporting environmental claims and, based on the FAQ, it appears that the Bureau has already evaluated certain standards, it would be helpful for the Bureau to maintain a publicly available list of standards that it has evaluated and has determined to meet the requirements of this provision (if the methodology is followed). This list could be maintained independent of the guidelines so as to allow for updates if necessary (without necessarily updating the guidelines). The list could provide the effective date of the assessment, allowing businesses to evaluate whether relevant circumstances have changed in the time since the Bureau's assessment such that the methodology may no longer meet the requirements of the provision. We expect that providing greater clarity on this important point would be very helpful to businesses advertising in Canada.

It would also be helpful for the Bureau to indicate its willingness to provide advisory opinions on methodologies and whether they will be considered "internationally recognized" for the purposes of section 74.01(1)(b.2).

Role of Canadian Government Guidance Should be Addressed.

We also note that the draft guidelines confirm that the Bureau "starts with the assumption that methodologies required or recommended by government programs in Canada for the substantiation of environmental claims are consistent with internationally recognized methodologies." Although this is a helpful acknowledgement, a Senate Committee report that considered the recent amendments to the Act expressed a clearer intention to recognize methodologies endorsed by Canadian governments. According to that report, "the Committee believes that the analysis [of what is considered an internationally recognized methodology] should also include federal and other Canadian best practices, such as those set out by Environment and Climate Change Canada."¹ It would be helpful for the Bureau to more definitively state that it will not challenge the validity of methodologies required or recommended by government programs in Canada. At a minimum, it would be helpful for the final guidelines to refer to the comments of the above-noted Senate committee.

Along these lines, prior to the introduction of the new "greenwashing" provisions, detailed guidance was being developed by Environment and Climate Change Canada (ECCC) in connection with regulations to be promulgated under the *Canadian Environmental Protection Act, 1999* to address the labelling of recyclable, compostable and recycled content. In 2023, ECCC issued a framework paper that includes a detailed discussion of how Canadian businesses should approach such recyclability and compostability labelling and claims. It would be helpful for the Bureau to acknowledge this ECCC guidance and indicate whether complying with the approach to such claims proposed therein would constitute sufficient substantiation and avoid a challenge from the Bureau.

Further clarifying the requisite "methodology" would be helpful.

Given the breadth of the new section 74.01(1)(b.2), it may apply to very basic representations. The draft guidelines helpfully comment in the response to FAQ 23 that "[a]t its simplest, a methodology is a procedure used to determine something." Indeed, in some cases, the requisite methodology could consist of simple addition.

The response to FAQ 23 also provides some helpful guidance in the context of new technologies for which there is no internationally recognized methodology to support a claim. It would, however, be helpful to also address the converse scenario to dispel any impression that an elaborate methodology is required to establish a very basic environmental claim that can be substantiated by simple means. For example, if a small business represents that it has stopped providing plastic bags to its customers to reduce environmental waste, simple logic and verification should constitute a sufficient methodology that is "recognized" in any country.

Reviving more specific guidance and direction would be helpful.

Previous Bureau guidance in the now-archived Environmental Claims guide provided detailed, practical and helpful direction on the use of particular types of claims and phrases. Providing such detailed guidance would also be more consistent with that provided by the Bureau's international counterparts. We understand, for example, that the U.S. Federal Trade Commission intends to publish an updated version of its more detailed Green Guides.

Separately, we note that the "net zero" example provided in the section of the draft guidelines discussing methodology is one where there is no methodology or support whatsoever. It would be helpful for the Bureau to provide additional examples of scenarios where the representation does rely on a methodology and indicate whether the Bureau would (or would not) consider the methodology to be

recognized or the testing to be adequate and proper. More generally, it would also be helpful for the Bureau to provide more examples in the final guidance and, in particular, examples that engage potential “grey” areas.

¹ Standing Senate Committee on National Finance, 44th Parliament, 1st Session, Seventeenth Report; online: <https://sencanada.ca/en/committees/NFFN/Report/133052/44-1>.