

## Briefing Note: amending Bill C-59 to more effectively combat greenwashing

### I. Summary

The Canadian Association of Physicians for the Environment (CAPE), the Quebec Environmental Law Centre (CQDE), Ecojustice, and Équiterre welcome the amendments proposed by the federal government in Bill C-59 to introduce sustainability considerations into the *Competition Act* (the Act), including the prohibition against greenwashing. However, as currently drafted, the proposed amendments will not effectively address greenwashing.

Below, we make recommendations to Parliament to improve the proposed amendments and include suggested legislative language in the Appendix. We also make recommendations for the creation of regulations, guidance, and additional enforcement capacity to support the effectiveness of Canada's regulatory framework.

### II. Background

Greenwashing<sup>1</sup> is a significant barrier to action on climate change because it skews the competitive landscape, impairs sustainable consumption decisions, harms consumer trust, and undermines companies' incentives to invest in green innovation.

Section 236 of Bill C-59 proposes to address greenwashing by amending s.74.01(1) of the Act, which prohibits the use of false and misleading claims to promote business interests. The amendment will require companies making claims about a product's environmental benefits to support these claims with an "adequate and proper test."

Addressing greenwashing under the Act fits within the spirit of the existing provisions in the Act that seek to prevent deceptive marketing, which leads to unfair competition in the Canadian marketplace, negatively impacts Canada consumers, and undermines Canada's competitiveness in a global net-zero economy.

### III. Recommendations to amend the greenwashing prohibition proposed in Bill C-59

#### 1.1 Expand s.236 to apply to environmental claims promoting activities, brands, and entities

The proposed amendment in s.236 only requires "adequate and proper tests" for environmental claims about products, but not necessarily for environmental claims about an activity, brand, or entity.

This omission is problematic because up to 80% of "green" advertisements focus on an activity, brand or entity.<sup>2</sup> As written, the proposed amendment will exclude many instances of greenwashing from the prohibition under the Act, even though they also unfairly advance a company's business interests. For example, deceptive claims about a company's net-zero targets and plans, or the contribution of an industry to climate change, will be out of scope.<sup>3</sup>

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<sup>1</sup> "Greenwashing" is the making of misleading, untrue, or unsupported representations about a product, company, brand, or entity's environmental characteristics.

<sup>2</sup> A 2022 Harvard University study found that only one in five "green" car advertisements sold a product, and the rest functioned primarily to present the brand as green: Supran, G. et al (2022) *Three Shades of Green(washing): Content Analysis of Social Media Discourse by European Oil, Car and Airline Companies*, Algorithmic Transparency Institute & Harvard University, [online](#).

<sup>3</sup> Note: the definition of a "test" appears broad enough to encompass the type of modelling necessary to demonstrate a credible climate plan sufficient for a net zero claim. Courts have referred to the dictionary definition of test as "...a procedure intended to establish the quality, performance or reliability of something": Competition Bureau of Canada (2016) *The Deceptive Marketing Practices Digest – Volume 2*, [online](#).

**RECOMMENDATION 1.1:** Amend s.236 to include all environmental claims, including those promoting activities, brands, and entities, to ensure fair competition and accurate information in the market. The European Union’s proposed rules on greenwashing define an “environmental claim” as including not only representations about a product, but also about a brand or trader.<sup>4</sup>

**1.2 Amend s.236 to require substantiation materials are accessible to the public**

The proposed amendment in s.236 does not ensure the public has any access to the tests and other materials used by companies to substantiate their environmental claims.

Since there is no obligation to publicly disclose the substantiation materials, competitors, regulators and consumers will likely be unable to easily verify the credibility of a company’s green claims both at the point of purchase – the time that it matters the most – or thereafter. They would need to take additional and time-consuming steps to access the substantiation materials, like contacting the company. The company may refuse to provide them to competitors or consumers, requiring legal or regulatory proceedings.

**RECOMMENDATION 1.2:** Amend s.236 to require that firms voluntarily making environmental claims publicly disclose the tests and information substantiating their claims in a format that is easily accessible including at the time of purchase. A similar requirement exists in France under the Environment Code.<sup>5</sup>

**1.3 Ensure s.236 is not unnecessarily limited to a narrow set of environmental attributes.**

Currently, s.236 only requires that claims about “protecting the environment or mitigating the environmental and ecological effects of climate change” be based on an adequate and proper test.

There is a risk that this language could be interpreted overly narrowly to exclude common greenwashing claims, such as those about the causes of climate change (rather than the effects), having a neutral effect on the environment (rather than a benefit), or restoring the environment (rather than protecting it). Making this clarification is within the spirit of the provision and would be beneficial to businesses, as well as to the courts.

**RECOMMENDATION 1.3:** Amend s.236 to cover a wider range of claims about environmental attributes.

**1.4 Require disclosure of all material negative environmental impacts**

The proposed amendment in s.236 does not require companies to disclose any negative environmental information about their product or company when advertising the positive attributes.

This allows companies to “cherry-pick” what information they provide - highlighting a single positive environmental attribute that is true (e.g., uses less water than before) without revealing other, more significant negative environmental attributes (e.g., contributes to massive ocean pollution).

**RECOMMENDATION 1.4:** Require companies making environmental claims to disclose all material negative environmental impacts associated with product, activity, brand or entity being advertised.

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<sup>4</sup> European Parliament, *Provisional Agreement Resulting from Inter-institutional Negotiations*, 7.11.2023 at p 20, [online](#).

<sup>5</sup> France, *Code de l’environnement*, article L541-9-1, [online](#).

#### IV. Recommendations to support the new greenwashing prohibition

Even with the above amendments to s.236 of the Bill, the new requirement in s.74.01(1)(b.1) of the Act will not be sufficient to effectively address greenwashing in Canada. Below, we propose the creation of regulations and guidance to support the new greenwashing provision and boost its effectiveness.

##### 2.1 Prohibit specific types of greenwashing by regulation

The existing enforcement regime in the Act, of which the proposed amendment in s.236 is part, relies on consumers to identify specific instances of greenwashing, and either make a complaint to the Competition Bureau or seek leave to bring a proceeding to the Competition Tribunal. This results in a response to greenwashing that is reactive, slow, uncertain, piecemeal, and resource-intensive.

This regime could be made more proactive and effective by enacting a regulation under the Act setting out specific types of environmental claims that are prohibited in all circumstances. This would provide greater certainty to companies who want to make environmental claims, which will reduce instances of greenwashing or make them easier to identify, investigate, and penalize.

**RECOMMENDATION 2.1:** Establish a regulation under the Act that lists specific environmental claims that are prohibited because they are false and/or misleading in all circumstances. The European Union has taken this approach in its *Unfair Commercial Practices Directive*.

##### 2.2 Establish a sustainability taskforce within the Competition Bureau

Greenwashing is rampant in the Canadian economy and addressing this issue requires specialized expertise in a range of scientific fields. To ensure Canada is a leader and not a laggard, the Competition Bureau needs a specialized unit that has the capacity and expertise to address greenwashing and other green competition issues. The United Kingdom's Competition and Market Authority has its own Sustainability Taskforce and the Competition Bureau already has a specialized branch, the Digital Enforcement and Intelligence Branch (CANARI).

**RECOMMENDATION 2.2:** Establish a sustainability taskforce within the Competition Bureau to tackle greenwashing and green competition issues.

##### 2.3 Publish guidance on greenwashing

To support compliance with the prohibitions against greenwashing in the Act, the Bureau should publish guidance on environmental claims. This would outline the Bureau's interpretation of the Act with examples of the types of claims that can (and cannot) be made and how to properly substantiate these claims. The Bureau published such guidance in 2008 but archived it in 2021. The competition authorities in the UK, New Zealand, and the Netherlands all publish guidelines for environmental claims.

**RECOMMENDATION 2.3:** The Competition Bureau should publish guidance on environmental claims.

Please do not hesitate to contact us if you have any questions.

#### **Contact**

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## Appendix – Proposed Amendments to Bill C-59

The black text is the original to s.236. The green, underlined text are our proposed additions. The ~~red text with a strikethrough~~ are our proposed deletions.

**236 (1)** Subsection 74.01(1) of the Act is amended by striking out “or” at the end of paragraph (b) and by adding the following after that paragraph:

(b.1) makes a representation to the public, in the form of a statement, warranty or guarantee about environmental attributes, including ~~of a product’s benefits for~~ protecting or restoring the environment or mitigating the environmental and ecological effects or causes of climate change, of a product, activity, brand, or entity that is not based on an adequate and proper test, the proof of which lies on the person making the representation, and the content of which must be made available to the public at the time when the representation is being made; or

(b.2) makes representations to the public about the positive environmental attributes of a product, activity, brand, or entity, without disclosing the corresponding environmental risks and impacts associated with the product, activity, or entity being advertised;