

BRIEFING NOTE: AMENDMENTS TO CANADA'S COMPETITION ACT BILL C-59 ON GREENWASHING

CANADIAN INSTITUTIONAL INVESTOR REACTIONS



On June 20, 2024, Canada's federal government passed amendments to Section 74.01 of the Competition Act to address the issue of greenwashing. While dealing with greenwashing has been an expectation, this particular action seems to have caught investors, issuers, NGOs and the general public by surprise.

As this announcement happened, Millani was in the final stages of completing its Semi-Annual Canadian Institutional Investor Sentiment Study interviews. To provide a perspective on this development, we are providing this briefing note which includes reactions and feedback from leading Canadian investors for government agencies, issuers and other market participants. The fulsome study is to be published in early September 2024.

Canada's Competition Act

Given there have been numerous legal commentaries and opinions related to the amendments to Bill C-59, we will reserve our commentary to basic facts.

The issue relates to article 74.01 of the Competition Act regarding misrepresentations to the public. While this is typically aligned with information directed at claims made by organizations relating to their products for consumers, the revisions, in particular the responsibility of an organization to test its claims according to "internationally recognized methodology," seems to be the issue at the heart of concerns.

The original text of the Act reads:

Misrepresentations to public

- **74.01 (1)** A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,
 - **(a)** makes a representation to the public that is false or misleading in a material respect;
 - **(b)** makes 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 thereof, the proof of which lies on the person making the representation; or
 - **(c)** makes a representation to the public in a form that purports to be
 - **(i)** a warranty or guarantee of a product, or
 - **(ii)** a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result, if the form of purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that it will be carried out

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The passing of this Bill will see a striking of the word “or” at the end of (b) and the addition of the following:

- **(b.1)** makes a representation to the public in the form of a 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 that is not based on an adequate and proper test, the proof of which lies on the person making the representation;
- **(b.2)** makes a representation to the public 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 ***that is not based on adequate and proper substantiation in accordance with internationally recognized methodology***, the proof of which lies on the person making the representation;

In addition, a key provision regarding Bill C-59 is the expansion of “private rights of action.”¹ Starting on June 20, 2025, the general public (be it an individual or a group), will be able to bring forth greenwashing complaints against an individual or company before the Competition Tribunal. Actions will proceed if the Competition Tribunal deems it “in the public interest.” According to Gowling WLG, an international law firm: “Effective June 2025, private actions by the public can be based on claims made as of June 20, 2024.”¹ As a result of Bill C-59, many experts are anticipating a rise in greenwashing claims to be brought on by the public and, more particularly, by environmental non-governmental organizations.

On July 22, 2024, the Competition Bureau of Canada launched a consultation which will be open for comments until September 27, 2024.

Investor Reactions

Investors desire decision-useful information to make appropriate investment decisions. While this amendment has taken many market participants by surprise, most indicated that overall, this move may incentivize regulators in Canada to accelerate their contemplation of mandatory corporate disclosures. The hope expressed by participants is that in doing so, any new rules would align with the International Sustainability Standards Boards (ISSB) standards, to which recommendations will be made to the Canadian Securities Administrators (CSA) by the Canadian Sustainability Standards Board (CSSB), following a consultation that closed in June 2024.

There are numerous criticisms of the Bill as being “vague and unnecessarily so” or as an “ill-thought-out statement on green hushing.” In particular, the Bill's lack of clarity on the use of “internationally recognized methodology” seems to have opened the door to significant uncertainty relating to corporate disclosures. It has been suggested that this is likely to mean that “it will become more complicated / difficult for investors to assess climate change commitments in general and, more precisely, a company's net-zero trajectory.” While others suggested that “the Bill has helped illustrate the urgent need for mandatory sustainability reporting in Canada so that investors have access to accurate, complete, comparable and reliable sustainability information from Canada's publicly traded companies.”

One investor explained that “ESG adoption is still in its early stages, but everyone understands it is inevitable and required. That said, different firms are at different stages and having the government implement a hardline on disclosures is impossible, as there is so much subjectivity and there are assumptions being made in many areas of current ESG reporting. This will only lead to less disclosure and reverse intentions, as no firm will want to be caught offside in [not] being able to substantiate claims.”

Another noted that the Bill “impacts all types of sustainability disclosure (qualitative and quantitative),” suggesting that “companies will remove all sustainability reports, website data, etc. until further guidance is given for risk of future litigation. While consumers and investors seek different information and have different levels of sophistication, I expect the majority of companies [will] not be differentiating between the two target audiences and [will] remove any type of sustainability information.”

1. Clearing The Air: Canada Adopts New Greenwashing Laws Under The Competition Act, Gowling WLG, June 27, 2024.

As predicted, we have witnessed that some issuers and industry associations have removed reports and claims from websites and other forms of communications. While this is the case, one investor expressed that “we expect the disclosures companies have made to date to have been done in good faith and represent their best efforts at capturing material information.” This investor added that for those companies that are no longer providing ESG content, **“they are not disclosing material information and it is not a tenable position to say that the fear of greenwashing litigation keeps them from disclosing material information to investors. Issuers might find themselves facing a different risk if they stop disclosing.** Further, the current response is going to lead to some serious questions about the validity of past reporting, so the decision to pull down disclosures could backfire.”

Others indicated that “we are appreciative of the companies that have stood behind their reporting efforts and not removed their ESG/sustainability reports in response to this Bill. This sends a signal to investors that they have followed/aligned with international standards (as recommended in the Bill), have used various forms of assurance, are meeting existing legal requirements, have mature/robust internal processes and systems, have board and senior executive oversight of reporting, and are generally confident in the data they are providing to investors and other stakeholders.” These are all factors that investors are ultimately seeking in both financial and sustainability related disclosures for investment-decision purposes.

However, not all investors see the removal of information from websites as negative. Some suggest that it is good to see companies and industry associations revisiting their broad public information considering the Bill, as the potential impacts of fines and reputational damage could be financially material. Some mentioned that if expressing any level of uncertainty, it is appropriate for the organization to remove content, retest, and that **“we hope to see balanced and truthful information about products and services, that can be substantiated in future communications, from companies and their industry associations for the benefit of all Canadians.”**

In the meantime, it was also noted that for those investors who use and have access to the CDP (formerly the Carbon Disclosure Project) where organizations have previously submitted data, previous entries cannot be deleted and therefore data and information remains available. This data can be used for investment purposes and is expected to be the base for additional scrutiny by investors for tracking progression and engagements.

Market Implications

This amendment has demonstrably created a lot of confusion and concern in the marketplace and in boardrooms across Canada, with an abundance of legal advice being provided. But what are the implications for issuers and investors from a capital markets perspective?

The most frequently quoted implication is that investors will lack material information to assess climate, net-zero or other targets that have been set. In the short term, the absence of information is seen as a step backwards for investors.

By extension, less information will lead to less confidence by investors in sustainability or labelled products (like sustainability linked or green bonds). It is therefore expected to slow capital flowing into ESG, sustainability or transition related funds, decreasing fund flows, new products and perhaps most importantly, slowing the much-needed capital raising by market participants who were seeking to execute decarbonization plans. Overall, this amendment may slow Canada's transition to a lower carbon economy in the short-term.

Finally, investors who have been expressing for some time to shorten reports, make them relevant to investors and to remove any superfluous information, are celebrating. One such investor expressed that “in the end, if it helps cut the fat in the long stories issuers write to make themselves look pretty, and they continue reporting ESG indicators, for us it is beneficial. If we end up having less information [...], we are not troubled by the situation. It is just another bump on the road.”

About Millani

Millani provides responsible investing and corporate sustainability advisory services, including ESG integration and impact, to both investors and companies.

For the past 15 years, Millani has become the partner of choice for institutional investors and corporations alike. By providing advisory services on integrating material ESG issues into investment strategies and decision-making processes, Millani helps reduce risks, increase returns and create value. Millani also regularly develops leading thought leadership on investor and disclosure trends. The firm leverages this expertise and experience to help corporations, both public and private, create strategies, engage with stakeholders and strengthen their disclosures, supporting the organizations in their access to capital and optimization of market value.

Millani's success is founded on a bespoke, client-centric approach that focuses on material issues, practical implementation, and independent advice. Our extensive capital market experience and unparalleled expertise in ESG, and its connection to value creation, position Millani at the nexus between investors and companies – making us unique in the Canadian market.

For more information, contact us at info@millani.ca or visit our website www.millani.ca.