Is the proposed amendment to the Competition Act to combat greenwashing really a step forward?

May 7, 2024

Greenwashing is a form of marketing that misrepresents a product, service or practice as having positive environmental effects,[1] thereby misleading consumers and preventing them from making an informed purchasing decision.[2]

Several initiatives have been launched around the world to counter this practice. In California, a law requires business entities to disclose information in support of environmental claims.[3] In France, ads featuring environmental claims such as “carbon-neutral” and “net zero” must include a quick response (QR) code that links to the studies and data supporting such claims.[4] Within the European Union, a proposal for a directive was published with a view to possibly banning generic terms like “environmentally friendly.”[5] In South Korea, the Korea Fair Trade Commission proposed an amendment to its Guidelines for Review of Environment-Related Labeling and Advertising that would simplify the process of issuing fines to businesses engaged in greenwashing.[6]

The Parliament of Canada seemingly followed suit by tabling Bill C-59,[7] which, if enacted, will introduce a provision into the *Competition Act*[8] aimed at improving the means to fight greenwashing. Because the provision will apply to “any person,” all businesses will be subject to it, regardless of their size or legal form.

Amendment to the *Competition Act*

The proposed legislative amendment would allow the Commissioner of the Competition Bureau (the “**Bureau**”) to assess[9] the conduct of any person promoting a **product** using an environmental claim or warranty.[10]

Insofar as a business or person is unable to demonstrate a product’s benefits for protecting the environment or mitigating the environmental and ecological effects of climate change, the Commissioner of Competition will be entitled to apply to a court for an order requiring such business or person to (i)cease promoting the product on the basis of a non-compliant environmental claim or warranty, (ii)publish a corrective notice and (iii)pay an administrative monetary penalty[11] of up to, for a legal person, the greater of $10 million and three times the value of the benefit derived from the deceptive conduct, or, if that amount cannot be reasonably determined, 3% of the legal person’s annual worldwide gross revenue. The penalty for each subsequent offence could be as high as $15 million.

Copyright (c) Lavery, de Billy, S.E.N.C.R.L. - L.L.P.

A “product” within the meaning of the *Competition Act* may be an article (real or personal property of every description) or a service.[12]

Moreover, where a false or misleading claim relates to a material aspect likely to play a role in the process of purchasing a product or service covered by such claim, and where the claim was made knowingly or recklessly, criminal proceedings may be instituted.[13]

This new provision expressly requires any person or business to base their environmental claims on “an adequate and proper test”.[14]

A “test” within the meaning of this Act consists in an analysis, verification or assessment intended to demonstrate the result or alleged effect of a product. It does not necessarily have to be a scientific method nor do the results need to meet a test of certainty, as the courts have generally interpreted the term “proper” to mean fit, apt, suitable or as required by the circumstances.[15]

Regarding misleading claims, the courts[16] have clarified the nature of the criteria that must be considered to determine whether a particular test is “adequate and proper.” Thus, an adequate and proper test depends on the claim made as understood by the common person. The test must also meet the following criteria:

> It must be reflective of the risk or harm which the product is designed to prevent or assist in preventing.
> It must be done under controlled circumstances or in conditions which exclude external variables or take account in a measurable way for such variables.
> It must be conducted on more than one independent sample wherever possible (e.g., destruction testing may be an exception).
> The results need not be measured against a test of certainty, but must be reasonable given the nature of the harm at issue and establish that it is the product itself which causes the desired effect in a material manner.
> **It must be performed regardless of the size of the seller’s organization or the anticipated volume of sales.**[17]

What impact will this amendment really have?

Notwithstanding the proposed legislative amendment, the *Competition Act* already covers false or misleading representations with respect to green advertising.[18] The current provisions already prohibit making representations to the public that are false or misleading in a material respect.[19]

In recent years, several complaints of greenwashing have been filed with the Bureau on this basis, and the Bureau has opened several investigations. The Bureau's investigations have led to significant settlements with regard to certain companies that have made representations in connection with their products[20]/[21]/[22]/[23].

The most recent complaints include one against Pathways Alliance, a group of six fossil fuel companies that ran a huge advertising campaign on the industry’s net zero targets, and another against Lululemon. Bureau investigations have led to substantial settlements, including with Keurig Canada, which agreed to pay a $3 million fine further to a Bureau investigation determining that the company had deceptively advertised its single-use K-pods as recyclable, and Volkswagen, which agreed to pay $2.1 billion for promoting certain vehicles equipped with “clean diesel engines with reduced emissions that were cleaner than an equivalent gasoline engine sold in Canada”.

In all of these cases, the heavy burden of establishing that the business’s environmental claim was false or misleading fell on the Bureau.

The proposed amendment to the *Competition Act* would change this by shifting the burden of proof onto businesses. The onus would therefore be on them to demonstrate that their product benefits the environment in some way or mitigates the environmental and ecological effects of climate

Copyright (c) Lavery, de Billy, S.E.N.C.R.L. - L.L.P.

change.

It appears that the proposed amendment will confirm, in a specific legislative provision, what was already a general standard since 1999, while easing the Bureau's burden of proof.

In addition to the *Competition Act*, other laws applicable in Quebec provide a general framework for greenwashing, such as the *Consumer Protection Act*.[24] Under this Act, no merchant, manufacturer or advertiser may, by any means whatsoever, make false or misleading claims to a consumer, which implicitly includes greenwashing.[25]

To determine whether a representation constitutes a prohibited practice, the general impression it gives, and, as the case may be, the literal meaning of the terms used therein must be taken into account.[26] In particular, it is prohibited to falsely ascribe particular advantages to a product or service, or to claim that a product has a particular feature or ascribe certain characteristics of performance to it.[27] Offences are subject to criminal[28] and civil[29] penalties.

Best practices

Regardless of whether the legislative amendment outlined here does eventually come into force, businesses must develop and convey an image of their environmental impact that is realistic and backed by credible data and facts.

Making sure that claims are legally compliant is not all that's at stake. A business's failure to do the above is likely to seriously harm not only its reputation, but also its relationship with its stakeholders.

Thus, before claiming to be "green," businesses must consider the following questions.

Are the real motivations behind the business's sustainability commitments clear, legitimate and convincing? Is sustainable development an integral part of the business strategy? Is it applied when addressing key business issues and taking new actions? Does the company have a sustainable development policy that is credible and based on relevant issues? Was it developed collaboratively with and approved by its Board of Directors? Has the company set specific, clear, measurable and achievable objectives and targets?

Conclusion

Parliament's message could not be clearer: Shifting the burden of proof onto businesses means the end of an era when products could be marketed as green in the absence of tangible evidence.

---

1. Definition of the Autorité des marchés financiers: 8 questions and answers about carbon credits and related concepts | AMF (lautorite.qc.ca)
2. Definition of the Competition Bureau: Environmental claims and greenwashing (canada.ca)
3. Assembly Bill No. 1305: *Voluntary carbon market disclosures*, California, 2023. Read it here: Bill Text – AB-1305 Voluntary carbon market disclosures
4. *Décret n° 2022-539 du 13 avril 2022 relatif à la compensation carbone et aux allégations de neutralité carbone dans la publicité*, Journal officiel de la République française, 2022. Read it here: Légifrance – Publications officielles – Journal officiel – JORF n° 0088 du 14/04/2022 (legifrance.gouv.fr)
5. Proposal for a Directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information, Council of the European Union, Brussels, 2022. Read it here: pdf (europa.eu)
6. KFTC Proposes Amendment to Review Guidelines Regarding Greenwashing – Kim & Chang (kimchang.com).
7. *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, 44th Parliament, 1st Session. Read it here: Government Bill (House of Commons) C-59 (44-1) – First Reading – Fall Economic Statement Implementation Act, 2023 – Parliament of Canada. The Bill is currently at second reading in the House of*

Copyright (c) Lavery, de Billy, S.E.N.C.R.L. - L.L.P.

Commons.

8. R.S.C. 1985, c. C-34.
9. This power to make inquiry would be available, as the Act already provides, upon receipt of a complaint signed by six persons who are not less than 18 years of age, or in any situation where the Commissioner has reason to believe that a person has contravened section 74.01 of the Act (see R.S.C. 1985, c. C-34, ss. 9 and 10).
10. *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*, 44th Parliament, 1st Session, section 236. Read it here: Government Bill (House of Commons) C-59 (44-1) – First Reading – *Fall Economic Statement Implementation Act, 2023* – Parliament of Canada; section 236 of this Act adds a paragraph (b.1) to subsection 74.01(1) of the *Competition Act*
11. *Competition Act*, R.S.C. 1985, c. C-34, para. 74.1. and Penalties and remedies for non-compliance (canada.ca).
12. *Competition Act*, R.S.C. 1985, c. C-34, para. 2(1).
13. *Competition Act*, R.S.C. 1985, c. C-34, para. 52(1).
14. *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*, 44th Parliament, 1st Session, para. 236(1).
15. *The Commissioner of Competition* v. *Imperial Brush Co. Ltd.* and *Kel Kem Ltd.* (c.o.b. as Imperial Manufacturing Group), 2008 CACT 2, para. 122 et seq.
16. The Competition Tribunal, the Federal Court and the superior court of a province, *Competition Act*, R.S.C. 1985, c. C-34, s. 74.09: "courts" means the Competition Tribunal, the Federal Court and the superior court of a province.
17. *The Commissioner of Competition* v. *Imperial Brush Co. Ltd. and Kel Kem Ltd.* (c.o.b. as Imperial Manufacturing Group), 2008 CACT 2.
18. Louis-Philippe Lampron, "L'encadrement juridique de la publicité écologique fausse ou trompeuse au Canada : une nécessité pour la réalisation du potentiel de la consommation écologique?" *Revue de Droit de l'Université de Sherbrooke*, Vol. 35, No. 2, 2005, p. 474. Read it here: A:\lampron.wpd (usherbrooke.ca).
19. R.S.C. 1985, c. C-34, s. 74.01(a).
20. Amanda Stephenson, *Des groupes écologistes misent sur la Loi sur la concurrence* (Environmental groups banking on the *Competition Act*), October 1, 2023, *La Presse*. Read it here: Des groupes écologistes misent sur la Loi sur la concurrence | *La Presse*.
21. Brenna Owen, *Un groupe accuse Lululemon d'« écoblanchiment » et demande une enquête (A group accuses Lululemon of "greenwashing" and calls for an investigation)* February 13, 2024, La Presse. Read it here: Un groupe accuse Lululemon d'« écoblanchiment » et demande une enquête | *La Presse*
22. Martin Vallières, "Gare aux tromperies écologiques" (Beware of greenwashing), January 26, 2022, *La Presse*. Read it here: Écoblanchiment | Gare aux tromperies écologiques | La Presse; Keurig Canada to pay $3 million penalty to settle Competition Bureau's concerns over coffee pod recycling claims – Canada.ca.
23. *The Commissioner of Competition* v. *Volkswagen Group Canada Inc. and Audi Canada Inc.*, 2018 Competition Tribunal 13.
24. *Consumer Protection Act*, CQLR c. P-40.1, ss. 219, 220 and 221
25. Definition of the Competition Bureau: Environmental claims and greenwashing (canada.ca)
26. *Richard* v. *Time Inc.,* 2012 SCC 8, paras. 46 to 57.
27. *Consumer Protection Act,* CQLR c. P-40.1, ss. 220 and 221.
28. *Consumer Protection Act*, CQLR c P-40.1, ss. 277 to 279: Fines range from $600 to $15,000 in the case of a natural person and $2,000 to $100,000 in the case of a legal person. Offenders convicted a second time are liable to fines twice as high as those prescribed.
29. *Id.,* ss. 271 to 276: Consumers may request that the contract be annulled, that the merchant's obligation be performed or that their obligation be reduced, among other things.

Copyright (c) Lavery, de Billy, S.E.N.C.R.L. - L.L.P.