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Environmental claims about a product, a service or business activities: stricter rules to combat greenwashing

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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] on November 30, 2023, which introduces a provision into the *Competition Act*[8]aimed at improving the means to fight greenwashing. Amended on May 28, 2024, Bill C-59 finally received royal assent on June 20, 2024, date on which it partially came into force.

Because the provision will apply to “any person,” all businesses will be subject to it, regardless of their size or legal form.

Amendments to the *Competition Act* regarding environmental claims

The *Competition Act* now allows[9] the Commissioner of the Competition Bureau (the “**Bureau**”) to inquire into[10] the conduct of a person who promotes 1) a **product** by making an environmental

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claim or warranty[11] or 2) any business interest by making representations about the environmental benefits of a business or business activity.

Claim concerning a product or service

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[12] 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.

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

With regard to 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]

Representations accompanying product that come from a person outside Canada are deemed to be made by the person who imports the product into Canada.[18]

General claims about a company's activities

While Bill C-59 was initially intended to cover only environmental statements, warranties or guarantees regarding products, the assented version of the bill provides that any representation made regarding 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 are subject to a Bureau inquiry.[19]

As an example cited by the Bureau, a company's claims about being "carbon neutral" or that it commits to becoming so within a certain number of years[20] would constitute "representations of the benefits of a business or business activity in mitigating the causes of climate change."

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The company making such claims must be able to demonstrate that they are based on “adequate and proper substantiation” obtained using an “internationally recognized methodology”.[21] The *Competition Act* does not specify which internationally recognized methods may be used for this purpose.

Should the substantiation the company uses be inadequate, improper or obtained using a method that is not recognized internationally, it will be subject to the same consequences as those mentioned in the previous section.[22]

Regardless of whether the claims concern a product or service or a business activity, the persons concerned are allowed to defend themselves under the *Competition Act* by establishing that they exercised due diligence.[23]

What impact will these amendments really have?

Notwithstanding the proposed legislative amendment, the *Competition Act* already covers false or misleading representations with respect to green advertising.[24] The current provisions already prohibit making representations to the public that are false or misleading in a material respect.[25]

In recent years, several complaints of greenwashing have been lodged with the Bureau on that basis, prompting it to open a number of investigations. Some have led to major settlements involving companies having made representations regarding their products.[26]/[27]/[28]/[29]

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 amendments 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 change or that its claims are based on adequate and proper substantiation obtained using an internationally recognized method.

These new legislative provisions now confirm what was already a general standard since 1999, and they ease 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*.[30]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.[31]

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. 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.[33] Offences are subject to criminal[34] and civil[35] penalties.

Private remedies

Another new measure to combat greenwashing in the *Competition Act* is the possibility for any person (individual, organization, competitor, etc.) to apply directly to the Competition Tribunal for an order against a business making environmental claims or representations about a product, service or activities without adequate substantiation.[36] In the first version of Bill C-59, only the Commissioner of Competition could institute such proceedings before the Tribunal.[37]

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However, the Competition Tribunal must first give leave to make such an application.[38] The Tribunal's power to give leave is largely discretionary, meaning that the Tribunal may grant it if it deems that it is in the public interest to do so.[39]

This new measure will come into force in one year on June 20, 2025.[40]

Best practices

It is crucial for a company to adopt and display a realistic image of its environmental impact based on 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?

Considerations for public companies

As concerns public companies subject to continuous disclosure obligations under Canadian securities legislation ("**reporting issuers**"), these considerations are set against a backdrop of increasing pressure from investors, including institutional investors, and others for greater transparency on climate-related issues.

Although climate-related disclosure requirements for Canadian reporting issuers are still relatively limited, many issuers choose to voluntarily disclose such information, for example in sustainability reports.

Reporting issuers must pay particular attention to their communications, which could constitute greenwashing within the meaning of the *Competition Act* and give rise to the penalties and other consequences mentioned above. This is another risk to add to reporting issuers' liability in the secondary market for misrepresentation and failure to make disclosures within prescribed time limits.

As far as climate issues are concerned, the risk arises in particular from overestimating or inadequately disclosing how activities contribute to protecting the environment or how they mitigate the environmental and ecological effects of climate change.

The current move towards standardized methodologies and frameworks and the forthcoming adoption of binding rules on climate-related disclosures should help to limit greenwashing in this context.

In the meantime, reporting issuers can reduce the risk of greenwashing by following a well-established international methodology and by including disclaimers for forward-looking statements adapted to the risks and uncertainties inherent to the climate-related information they provide.

Conclusion

The new provisions of the *Competition Act* are already having an impact. As a precaution, some companies have removed ads, promotional documents and websites containing claims that certain activities were undertaken specifically to mitigate the causes of climate change.

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Parliament's message could not be clearer: Shifting the burden of proof onto businesses means closing the door on an era when products, services and business activities could be marketed as green in the absence of tangible evidence.

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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^{o} 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. Read it here: 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 Commons.
8. R.S.C. 1985, c. C-34.
9. These provisions came into force on June 20, 2024.
10. This power to make inquiry would be available, as the *Competition 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 *Competition Act* (see R.S.C. 1985, c. C-34, ss. 9 and 10).
11. *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 paragraphs b.1 and b.2 to subsection 74.01(1) of the *Competition Act*.
12. *Competition Act*, R.S.C. 1985, c. C-34, article 74.1.
13. *Competition Act*, R.S.C. 1985, c. C-34, subsection 2(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). Read it here: Government Bill (House of Commons) C-59 (44-1) – First Reading – *Fall Economic Statement Implementation Act, 2023* – Parliament of Canada
15. *The Commissioner of Competition v. Imperial Brush Co. Ltd.* and *Kel Kem Ltd.* (c.o.b. as Imperial Manufacturing Group), 2008 CACT 2, paras. 122 et seq.
16. *Competition Act*, R.S.C. 1985, c. C-34, section 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. *Competition Act*, R.S.C. 1985, c. C-34, subsections 74.03(1) and (2).
19. *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; paragraph b.2 of section 74.01 of the *Competition Act* was added by amendment adopted on May 28, 2024.
20. Letter from Anthony Durocher and Bradley Callaghan to the Honourable Pamela Wallin dated May 31, 2024. Read it here: BANC_Follow-up_CompetitionBureau_e.pdf (sencanada.ca).
21. *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.
22. *Competition Act*, R.S.C. 1985, c. C-34, article 74.1.
23. *Competition Act*, subsection 74.1(3).
24. 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).

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25. *Competition Act*, R.S.C. 1985, c. C-34, paragraph 74.01(1)(a).
26. 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*.
27. 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.*
28. 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.
29. *The Commissioner of Competition v. Volkswagen Group Canada Inc. and Audi Canada Inc.*, 2018 Competition Tribunal 13.
30. *Consumer Protection Act*, CQLR c. P-40.1, ss. 219, 220 and 221.
31. Definition of the Competition Bureau: Environmental claims and greenwashing (canada.ca).
32. *Richard v. Time Inc.,* 2012 SCC 8, paras. 46 to 57.
33. *Consumer Protection Act*, CQLR c. P-40.1, ss. 220 and 221.
34. *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.
35. *Id*. at 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.
36. For civil matters only; *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, subsection 254(1).
37. See subsection 103.1(1) of the *Competition Act,* R.S.C. 1985, c. C-34, effective before June 20, 2024.
38. *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, subsection 254(1).
39. *Id*. at 254(4).
40. *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 272.

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