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Greenwashing Lands Keurig Canada $3 Million Fine From the Competition Bureau of Canada

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By Paula Boutis

Green label claims can be a lucrative advertising strategy. But, as Keurig Canada found out following a May 2019 application by EcoJustice, businesses can find themselves offside the rules prohibiting misleading or unsubstantiated environmental claims under several pieces of legislation, including the *Competition Act*.

Under *section 74.01 of the Competition Act*, promoting, directly or indirectly, the supply or use of a product, which is false or misleading in a material respect, is "reviewable". The case law indicates that the general impression left by the representation as well as the literal meaning is to be taken into account in determining whether or not the person who made the representation engaged in the reviewable conduct. The "general impression" test, interpreted by the Supreme Court of Canada under Quebec legislation, is the impression a person has after initial contact with the entire advertisement, and it relates to both the layout of the advertisement and the meaning of the words.

Following EcoJustice's application, Keurig entered into a consent agreement with the Competition Tribunal for misleading recycling-related representations throughout Canada "to promote the use of K-Cup pods and its brewing systems." The Commissioner concluded that the recycling representations were false and misleading and do not meet the practices for recyclability claims as articulated in Environmental claims: A guide for industry and advertisers, which guide is, as of November 4, 2021, archived and now replaced by other guidance.

In the consent agreement, Keurig agreed to several things, including:

- Creating new templates for K-Cup packaging within 60 days of the execution date for the agreement
- Paying $3,000,000 as an administrative monetary penalty
- Paying $800,000 to a Canadian charitable organization focused on environmental causes, as approved by the Commissioner
- Publishing corrective notices
- Enhancing and maintaining its corporate compliance program with respect to the *Competition Act*

Greenwashing claims are gaining steam in Europe as well. In Italy, a business successfully sued its competitor for greenwashing claims under the Italian Civil Code. The Court referred to the guidelines issued by the European Commission in reaching its conclusions. This is apparently the first time an ordinary civil court has addressed this issue. Until that point, complaints of this nature had been addressed through administrative bodies. Using the court system may allow for damages claims by competitors, not only fines under administrative regimes.

It should be noted that Ontario's new regulation to bring extended producer responsibility to the blue box program specifies, at section 18, that "nothing in this regulation shall be construed as requiring or authorizing any person or entity to engage in an activity that would constitute a contravention of the *Competition Act*."

EcoJustice has filed two other applications with the Competition Bureau related to "flushable wipes" and the Sustainable Forest Management Standard. These inquiries are ongoing.

Given the substantial fines and reputational harm that can result, producers should be sure to review their policies and practices to ensure they are not offside the legislation and guidelines established by the Competition Bureau of Canada.

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