

# Avoiding Liability for “Greenwashing” in Product Advertising



**Simply slapping a ‘green’ label on your product can lead to massive fines and prison sentences.**

As consumers become more environmentally aware and inclined to buy ‘green,’ companies have stepped up their efforts to tout the environmental virtues of their products and services. Unfortunately, many of these claims are false or misleading. Four in 10 companies that use green advertising ‘appeared to be using tactics that could be considered misleading,’ according to a recent study from the International Consumer Protection and Enforcement Network surveying 500 different company websites. There’s even a term for this practice: ‘greenwashing.’

Greenwashing raises not only ethical and moral issues but also legal concerns. If a company’s environmental claims aren’t accurate, it faces liability under a variety of consumer protection laws. And the penalties can be stiff. For example, Keurig Canada was recently hit with a \$3 million fine for greenwashing the recyclability of its K-Cup coffee pods. Here’s a briefing of greenwashing regulation and how to avoid liability.

## **Defining Our Terms**

By ‘environmental claim,’ we mean any statement or symbol that refers to, or creates the general impression that it reflects, the environmental aspects or benefits of any product, process used to create a product or service. Environmental claims may take the form of statements, symbols, or graphics on product or package labels or in product literature, technical bulletins, advertising, publicity, telemarketing, and digital or electronic media like the internet.

## **What the Law Requires**

Like all other advertising and labelling claims, environmental claims are subject to federal consumer protection laws that bar companies from making

'false or misleading representations' about their products or services. All environmental claims must be verified and substantiated with supporting data that's accurate and readily available to law enforcement agencies, such as the Competition Bureau. The Bureau can take civil or criminal actions against a company for making false or misleading claims. Three key laws apply:

**The *Competition Act*** (Act) bans businesses from making false or misleading claims to promote a service, product or business interest. Courts consider not only a claim's literal meaning but the 'general impression' it conveys in determining whether it's false or misleading. The Act also bans claims about a product's performance, effectiveness or durability that aren't based on adequate and proper testing. In addition to a prison sentence of up to 14 years, there's no limit to the amount of the fine a court can impose for a violation.

**The *Consumer Packaging and Labelling Act*** (CPLA) requires that prepackaged non-food consumer products bear accurate and meaningful labelling information to help consumers make informed purchasing decisions. The CPLA also bans false or misleading representations and sets out specifications for mandatory label information such as the product's name, net quantity and dealer identity. All information on a package, whether in symbols or words, must be neither false nor misleading to consumers. In addition to imposing civil and criminal fines, the government may seize products labelled with false environmental claims.

**The *Textile Labelling Act*** (TLA) is to textile products what the CPLA is to non-food consumer, requiring that they bear accurate and meaningful labelling that include specified information, such as the generic name of each fibre present, and banning false or misleading representations. TLA inspectors have broad powers to enter any place at any reasonable time, examine textile fibre products, open packages, examine and make copies of documents or papers and seize products, labelling, packaging or advertising material.

## How to Comply

Bureau guidance explains how companies can minimize risk of liability for false or misleading environmental claims when selling goods or services in Canada.

### Avoid False or Misleading Claims about Product Performance

You can make whatever claims you want about the green aspects of your products and services as long as you can prove the claim is based on an 'adequate and proper' testing that:

- Is performed before the performance claim is made;
- Is done under controlled circumstances to eliminate external variables;
- Eliminates subjectivity as much as possible;
- Reflects the real-world usage of a product; and
- Supports the general impression created by the marketing claims.

The Bureau cautions marketers to avoid:

- Making broad or vague claims based on testing that's only partially relevant (for example, basing nationwide claims on a specific level of energy savings offered by a heat pump product based on testing conducted only in Southern Ontario, where winters tend to be much milder);

- Basing performance claims on test results that are insignificant or based on mere chance or one-time effect;
- Basing performance claims on studies or sales of similar products; and
- Basing performance claims on technical books, bulletins and manuals, or anecdotal stories.

## General Advertising 'Do's'

You should also ensure that your marketing staff knows about the Bureau's Do's and Don'ts for avoiding not just greenwashing but all forms of false deceptive advertising. Things you should do when advertising:

- **Do** avoid fine print disclaimers'if you do use them, make sure the overall impression that the ad and disclaimer create isn't misleading;
- **Do** fully and clearly disclose all material information in the ad;
- **Do** avoid using terms or phrases in an ad that aren't 'meaningful and clear to the ordinary person';
- **Do** charge the lowest of 2 or more prices appearing on a product;
- **Do** ensure that you have reasonable quantities of a product advertised at a bargain price; and
- **Do**, when conducting a contest, disclose all material details required by the Act before potential participants are committed to it.

## General Advertising 'Don'ts'

The Bureau also lists 'don'ts,' or things you shouldn't do in advertising because they can lead to liability under the Act, including:

- **Don't** confuse 'regular price' or 'ordinary price' with 'manufacturer's suggested list price' or a like term'they're often not the same;
- **Don't** use "regular price" in an ad unless the product has been offered in good faith for sale at that price for a substantial period of time, or a substantial volume of the product has been sold at that price within a reasonable period of time;
- **Don't** use the words "sale" or "special" in relation to the price of a product unless a significant price reduction has occurred;
- **Don't** run a "sale" for a long period or repeat it every week;
- **Don't** increase the price of a product or service to cover the cost of a free product or service;
- **Don't** use illustrations that are different from the product being sold;
- **Don't** make a performance claim unless you can prove it, even if you think it's accurate;
- **Don't** assume that testimonials amount to adequate proof'they generally don't;
- **Don't** sell a product above your advertised price;
- **Don't** unduly delay the distribution of prizes when conducting a contest;
- **Don't** make any materially misleading product warranty or guarantee, or promise to replace, maintain or repair an article;
- **Don't** use the results of product performance tests and/or testimonials in your advertising unless you are authorized to use them'if you are authorized to use them, don't distort test results or the scope of testimonials; and
- **Don't** forget that no one actually needs to be deceived or misled for a

court to find that an ad is

## Other Problematic Ad Practices

In the greenwashing context, certain advertising practices can be highly problematic and likely to lead to liability, including:

**Claims without Explanations.** Some environmental claims are self-explanatory and don't need a lot of explanation, such as a statement that a product's packaging is made from 30% recycled cardboard. But other claims run the risk of being misinterpreted. Such claims should be accompanied by an explanatory statement or information if necessary to give a false or misleading impression. **Example:**

- **Wrong:** Less material was used in this product.
- **Right:** This product has been designed to use less raw material than the previous model.

**Vague or Non-specific Claims.** An environmental claim that's vague, non-specific, incomplete or which broadly implies that a product's environmentally beneficial or neutral shouldn't be used unless it's accompanied by a statement that supports the claim. Red flags include use of terms like 'environmentally friendly,' 'environmentally safe,' 'ecological (eco),' 'non-polluting,' 'natural' and 'green' are examples of vague claims and should be reserved for products/services whose life cycles have been thoroughly examined and verified. In addition, broad claims such as 'safe for the environment' or 'non-polluting' are likely to require more comprehensive test results to back them up than fact-specific claims, such as 'contains no chlorine.' **Examples:**

- **Wrong:** This product is ozone-friendly.
- **Right:** We've replaced the aerosol ingredients in this product with an alternative that does less harm to the ozone layer.

**'Substance-free' Claims.** Claims of being 'free' of a certain substances harmful to the environment can be deceptive, especially if such substance or ingredient wasn't contained in previous versions or standard versions of the product, such as 'pesticide-free' in an ad for a standard household laundry detergent product.

**Claims of Sustainability.** Sustainability can be measurable only over a very long period. Thus, it's very difficult to make a verifiable claim of sustainability at one fixed point in time. However, claims that refer to specific, registered environmental management systems are sometimes acceptable provided that they can be verified. **Examples:**

- **Wrong:** Made from wood that's sustainable.
- **Right:** Made from wood that comes from a forest that was certified to a sustainable forest management standard.