

Cracking Down on Greenwashing Has Become an Enforcement Priority



Companies pay the price for making false environmental claims about their products.

As consumers become increasingly engaged in global warming and other environment challenges, corporations that offer eco-friendly products and services gain a potentially significant strategic advantage. However, touting the environmental benefits of a product or service can also lead to liability if those claims are false, misleading, overstated or unsubstantiated. Cracking down on this practice, known as 'greenwashing,' has become a major priority for regulators and enforcers.

Regulation of Greenwashing in Canada

The principal source of greenwashing regulation in Canada is the federal *Competition Act*, which bans businesses from making 'materially' false or misleading representations to the public to promote the supply or use of a product, service or business interest. A representation is considered 'material' if it could influence a consumer to buy or use the product or service, based on not just what it says but also the 'general impression' it makes on a consumer. Penalties for violations may include:

- Criminal fines of up to \$200,000 and up to 14 years in prison; and
- Administrative monetary penalties (AMPs), which for corporations may be up to the greater of: (i) \$10 million for a first violation (\$15 million for second and subsequent violations), or 3 times the value of the benefit derived from the deceptive conduct (or, if that's too hard to calculate, 3% of a corporation's worldwide annual gross revenues).

Violations of greenwashing laws can also expose corporate officers and directors to risk of personal liability.

Other Laws Banning Greenwashing

The *Textile Labeling Act* and *Consumer Packaging and Labeling Act* include similar prohibitions. The *Trademarks Act* also bans making

materially false and misleading statements about the character, quality, quantity, composition, geographical origin or mode of manufacture, production or performance of goods or services. In addition, under the *Canadian Code of Advertising Standards*, ads may not contain inaccurate, deceptive or otherwise misleading claims, statements, illustrations or representations, and all representations must be supported by reliable evidence.

Enforcement of Greenwashing Laws

The federal Competition Bureau, which enforces the *Competition Act* and other consumer protection laws, has published guidelines explaining how the laws apply to environmental claims and greenwashing. On September 20, 2022, the Bureau hosted a Competition and Green Growth Summit to address the interaction between competition law/policy and sustainability and make it clear that it considers greenwashing a priority for enforcement.

Meanwhile, environmental activists have ratcheted up the pressure utilizing Section 9 of the *Competition Act*, which allows 6 persons to apply to the Commissioner to start a formal investigation into conduct that may violate the Act. For example, in 2019, a group called Ecojustice got the Bureau to investigate claims made by Keurig Canada Inc. about its single use coffee pods being made from recyclable plastic. The Bureau determined that the claims were false or misleading resulting in a \$3 million penalty, \$800,000 environmental charity donation and reimbursement of the Bureau's \$85,000 in legal costs. The company also agreed to change its recyclable claims and packages, issue corrective notices and beef up its corporate compliance program.

Inspired by the Keurig case, activists have filed at least 2 other Section 9 'six person' applications with the Bureau:

- In April 2022, Ecojustice applied for an investigation of a financial institution about touting its commitment to address climate change and reduce emissions while continuing to promote development and expansion of fossil fuels; and
- On November 10, 2022, the Canadian Association of Physicians for the Environment announced that the Bureau has opened an investigation into the Canadian Gas Association for making claims about gas being 'clean' and environmentally friendly as part of its Fueling Canada advertising campaign.

Takeaway

With environmental groups and regulators mobilizing against greenwashing, businesses must make it a priority to avoid false and misleading claims about the environmental benefits of their products and services. Go to the OHS Insider website for detailed guidance and advertising Do's and Don'ts that can help you insulate your own company from greenwashing liability risk.