Federal Budget Bill Eliminates 2 Troublesome "Greenwashing" Law Rules

On June 20, 2024, the Canadian Parliament passed legislation to crack down on "greenwashing," which occurs when a company makes "false or misleading representations" about the environmental benefits of its products. While such practices were already illegal, the new Bill C-59 amendments to the *Competition Act* address the greenwashing issue head-on by requiring, among other things, that companies prove the representations they make about the beneficial impacts of their products and services on the environment and/or climate change.

But less than 2 years into the experiment, the government is shifting gears. Newly tabled Budget 2025 acknowledges that the new *Competition Act* greenwashing provisions have "created investment uncertainty" and, in some cases, "slowed or reversed efforts to protect the environment." So, on November 18, the government introduced and will soon pass new legislation (Bill C-15) to modify some of the more controversial aspects of the law. Here's a briefing on what EHS coordinators need to know about the proposed changes to the greenwashing laws.

1. **Elimination of Business**

Activity“International Methodology” Substantiation Rule

The so-called “Business Activity” provision of the original greenwashing legislation bans representations to the public for purposes of, directly or indirectly, promoting the supply or use of a product or business interest by touting the benefits of a business or business activity for protecting or restoring the environment or mitigating climate change that’s not based on adequate and proper substantiation “in accordance with internationally recognized methodology.”

The problem is that there are currently no guidelines, standards, or case law defining “adequate and proper substantiation in accordance with internationally recognized methodology.” Despite recent guidance from the Competition Bureau, the standard remains unclear, especially on the crucial issue of what companies must do to substantiate novel claims (for example, in connection with adoption of new abatement technologies). And since they bear the burden of proof, the lack of a definition or guidelines puts companies in a precarious position. Accordingly, Bill 15 proposes to solve the problem by eliminating the requirement altogether.

2. Continuation of the Product Benefit Provision

The “Product Benefit” provisions of the greenwashing laws make it illegal for companies to make public representations for purposes of, directly or indirectly, promoting the supply or use of a product or business interest in the form of a statement, warranty or guarantee of a product’s benefits for protecting or restoring the environment or mitigating climate change that’s not based on “adequate and proper testing.” Unlike the Business Activity rule, the Product Benefit rule is not being eliminated.

Explanation: Unlike with substantiation of representations under Business Activity, there are official Competition Bureau guidelines for “adequate and proper testing” required for making claims subject to the Product Benefit rule (see “Takeaway” below for a summary.)

3. Elimination of Private Greenwashing Competition Tribunal Complaints

The original Bill C-59 gave private individuals and organizations the right to file greenwashing complaints against companies directly with the Competition Tribunal while also authorizing the Tribunal to impose administrative monetary penalties (AMPs) of up to 3 times the global revenues of offending companies. Combined with uncertainty over how to substantiate business activity in accordance with internationally recognized methodology, this increased risk of private complaints by environmental activists led many companies to simply refrain from making any kinds of environmental representations about their businesses. If it passes, Bill C-15 will eliminate the right of private third parties to bring greenwashing cases directly to the Competition Tribunal.

4. Continuation ofLiability Risk for Bureau Greenwashing Complaints & Private Lawsuits

Bill C-15 provides companies with only partial relief against greenwashing liability risk. The federal government still retains its original Bill C-59 authority to hit violators with AMPs of whichever of the following is greater:

- $10 million for a first offence and $15 million for a repeat offence.

- Three times the value of the benefit the company derived from the deceptive conduct, or, if that amount can’t be reasonably determined, 3% of the company’s annual worldwide gross revenues.

Even though they won’t be able to bring complaints directly to the Competition Tribunal, nongovernment advocacy groups will still be able to file private lawsuits seeking damages against companies under the general misleading advertising or Product Benefit provisions of the Act.

Takeaway: How to Manage Greenwashing Liability Risks

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”: The Bureau’s recommendations to companies include:

- Performing the testing before making the claim.
- Testing under controlled circumstances to eliminate external variables.
- Using multiple independent samples whenever feasible.
- Eliminating subjectivity as much as possible.
- Ensuring the test reflects the product’s real-world use and that the results reasonably show its significant effect.

The Bureau cautions companies 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.
- Basing performance claims on technical books, bulletins and manuals, or anecdotal stories.

General Advertising “Do’s”

You should also ensure that your marketing staff know about the Bureau’s Do’s and Don’ts for avoiding not just greenwashing but all forms of false and 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.
- 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.
- Don't forget that no one actually needs to be deceived or misled for a court to find that an ad is misleading.

Other Problematic Greenwashing 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.

- **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."

- **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.

- **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.