

New Federal Law Tightens Ban, Increases Penalties for Greenwashing



As consumers become more environmentally aware, companies have stepped up their efforts to tout the “green” virtues of their offerings. 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 study from the [International Consumer Protection and Enforcement Network](#) surveying 500 different company websites. On June 20, the Canadian government passed legislation to crack down on this practice, known as “greenwashing.” Here’s a briefing of what EHS coordinators need to know about the new law.

The New Greenwashing Law

Making “false or misleading representations” about the environmental benefits of products or services is already illegal under several laws, including the *Competition Act* (Act). Newly passed Bill C-59 (Bill) makes amendments to the Act to address the greenwashing issue head-on and require companies to prove what they say about what their product or service does to help the environment and/or mitigate climate change, depending on the kind of representation they make.

The Product Benefit Provision

The “Product Benefit” provision bans representations to the public for purposes of, directly or indirectly, promoting the supply or use of a product or business interest in 2 forms 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.” Although the Bill doesn’t define “adequate and proper testing,” the agency that enforces the law, the Competition Bureau, has published guidelines, based on case law, on what the term means regarding general performance claims, which we’ll explain below.

The Business Activity Provision

The “Business Activity” provision 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. Unlike “adequate and proper testing,” there are currently no guidelines, standards, or case law defining “adequate and proper substantiation in accordance with internationally recognized methodology.” And since companies bear the burden of proof, the lack of a definition or guidelines puts companies in a precarious position.

New Liability Risks for Engaging in Greenwashing

In addition to the new burden of proof rules, companies now face greater liability risks for engaging in greenwashing.

Administrative Monetary Penalties

The Bill gives the federal government authority to hit violators with an administrative monetary penalty (AMPs) of whichever of the following is greater:

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

Risk of Private Lawsuits

Being targeted by government enforcement action isn't the only way greenwashing can get companies into legal hot water. The Bill now allows for private individuals and organizations to bring legal actions against offending companies "in the public interest." Environmental advocacy groups have made no secret of their distaste for greenwashing and the harms it perpetuates. Accordingly, lawyers expect these groups to make widespread use of the new private action rights.

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 "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; and

- 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; and
- Basing performance claims on technical books, bulletins and manuals, or anecdotal stories.

Unfortunately, there are no Bureau guidelines on "adequate and proper substantiation in accordance with internationally recognized methodology" required to back representations under the Business Activity provision.

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 warranties or guarantees, 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 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.

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 is 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”. These 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 o-zone friendly.
- **Right:** We’ve replaced the aerosol ingredients in this product with an alternative that does less harm to the o-zone 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.