

Food Truthiness – Greenwashing in the Food Industry

By [Richard Butler](#), Partner, [Giselle Davidian](#), Associate and [Serin Remedios](#), Associate.
© Willms & Shier Environmental Lawyers LLP.¹

March 1, 2018

“Is it local? Is it organic?” are questions increasingly asked by food consumers. Many consumers’ food purchasing patterns are influenced by concerns about the environment, health, or animal wellbeing. Studies show that consumers are often willing to pay a premium for food products that match their values; for example, that the food product is grown locally, organically, or produced in environmentally conscious ways.² How then can consumers trust that environmental representations food producers make about their products are true?

Canada has both federal and provincial laws that regulate food labelling and marketing. Food producers must be aware of the laws and liability surrounding greenwashing of their environmental practices or the environmental benefits of their products. Food industry participants who misrepresent their products can face significant prosecution, fines, and reputational damage.

What is Greenwashing?

With the growth of consumers’ environmental awareness, companies have begun incorporating environmental representations into their marketing. Sometimes these representations are false or exaggerated. “Greenwashing” is a term used to describe the act of misleading consumers about the environmental practices of a company or the environmental benefits of a product or service.

Greenwashing encompasses a number of activities and can include:

- ◆ Outright misrepresentation or false claims; for example where a product is sold as pesticide free - but it is not, and
- ◆ Marketing “truthiness” discrepancies such as questionable labels, hidden trade-offs, failure to prove claims, vagueness, irrelevance, or questionable comparisons (i.e. being a lesser of two evils).³

¹ This article follows Richard and Giselle’s presentation at “Taking Stock: The State of Food Law and Policy in Canada” conference, hosted by the University of Ottawa Faculty of Law, November 4, 2017.

² USDA Economic Research Service, “Investigating Retail Price Premiums for Organic Food”, May 24, 2016, online: <<https://www.ers.usda.gov/amber-waves/2016/may/investigating-retail-price-premiums-for-organic-foods/>>; Business Development Canada Study, “Mapping Your Future Growth: Five Game-Changing Consumer Trends”, October 2013, online: <https://www.bdc.ca/Resources%20Manager/study_2013/consumer_trends_BDC_report.pdf?ref=short-url-consumertrends>.

³ Underwrites Laboratories, “The Sins of Greenwashing: the Seven Sins” (Accessed December 6, 2013), online: <<http://sinsofgreenwashing.com/findings/the-seven-sins/index.html>>.

Volkswagen is a recent high-profile example of a company that greenwashed its emissions technology. In 2015, Volkswagen was accused of cheating emissions tests in the United States and Canada.⁴ Previously, Volkswagen was an internationally recognized “green” and socially responsible company with a reputation of producing fuel-efficient cars.⁵ Volkswagen spent \$14.7 billion to settle the regulatory allegations against the company. This does not include the additional billions Volkswagen spent to address its polluting cars, fines for violating clean air laws and additional lawsuits.⁶ The brand reputation fall-out continues.

How Can Greenwashing Apply to Food?

Greenwashing is a form of “food fraud”: the misrepresentation or adulteration of a food product for financial gain. Food fraud can include product substitution or alteration, mislabelling and misrepresentation about the origin, content, or manner in which the food product was prepared.

Consumers are increasingly willing to pay a premium for food they believe to be organic, local or produced using more environmentally friendly practices. Such consumers seek out organic foods, and foods with low carbon impacts. Food producers, processors or distributors who engage in food truthiness seek the financial benefit of selling organic, green or sustainable products, without paying the additional expenses associated with meeting those standards.

For example, in September 2016, an Ontario food processor was accused of mislabelling conventional meat as “certified organic.”⁷ The company was charged with offences under the *Food and Drugs Act*,⁸ the *Consumer Packaging and Labelling Act*,⁹ and the *Organics Products Regulation*.¹⁰

⁴ Russell Hotten, “Volkswagen: The Scandal Explained” *BBC News* (December 10, 2015), online: <<http://www.bbc.com/news/business-34324772>> [BBC News].

⁵ Jennifer Lynes, “Volkswagen committed the cardinal sin of greenwashing: Lying” *The Globe and Mail* (September 24, 2015) online: <<https://www.theglobeandmail.com/report-on-business/rob-commentary/volkswagen-committed-the-cardinal-sin-of-greenwashing-lying/article26500698/>>.

⁶ BBC News, *supra* note 3 and David Shepardson, “U.S. judge approves \$14.7 billion deal in VW diesel scandal” *Reuters* (October 25, 2016) online: <<https://www.reuters.com/article/us-volkswagen-emissions/u-s-judge-approves-14-7-billion-deal-in-vw-diesel-scandal-idUSKCN12P22F>>

⁷ Ann Hui, *The Globe and Mail* (October 24, 2016, updated April 5, 2017) online; No prosecution bulletin of a conviction was available at the time this article was first published.

⁸ *Food and Drugs Act*, RSC 1985, c F-27.

⁹ *Consumer Packaging and Labelling Act*, RSC 1985, c C-38.

¹⁰ *Organic Products Regulations, 2009*, SOR/2009-176.

In another example, Mucci International Marketing Inc., Mucci Pac Ltd. and two directors were convicted of misrepresenting the country of origin of greenhouse vegetables and fined \$1.5 million.¹¹ The defendants labelled the vegetables as a “Product of Canada” when, in fact, the vegetables were imported. In addition to the CFIA investigation and conviction, the Ontario Greenhouse Vegetable Growers Association subsequently levied a \$3.2 million fine against the two Mucci companies for failing to comply with the marketing board’s regulations.¹²

Another example is a recent Canadian Broadcasting Corporation (“CBC”) investigation into greenwashing at farmers’ markets in Ontario.¹³ CBC’s investigation found numerous vendors at farmers’ markets across Ontario misrepresenting their produce to consumers. The vendors represented to consumers that the produce was grown by the vendor, when in fact the vendors were reselling wholesale goods.

Environmental Regulatory Liability

Greenwashing food products can carry significant consequences for food producers. Food labelling and marketing is regulated both federally and provincially by different bodies. Food product greenwashing can result in prosecutions and hefty fines.

Federal Laws

Federally, the Canadian Food Inspection Agency (“CFIA”) regulates food labelling under numerous acts and regulations.¹⁴ The *Safe Food for Canadians Act* received Royal Assent on November 22, 2012 and is in force.¹⁵ Once regulations are released, the *Safe Food for Canadians Act* is expected to change the food regulatory landscape.

¹¹ Canadian Food Inspection Agency, “Mucci International Marketing Inc., Mucci Pac Ltd., and Two Directors fined \$1,500,000.00 for offences under the *Food and Drugs Act*, the *Consumer Packaging and Labelling Act* and the *Canada Agricultural Products Act*” (Ottawa: June 7, 2016) online: <<http://www.inspection.gc.ca/about-the-cfia/newsroom/prosecution-bulletins/2016-06-07/eng/1465324138085/1465324139940>> [Mucci International].

¹² Peter Kuitenbrouwer, “It says ‘Product of Canada’ but is it? The growing problem of ferreting out counterfeit vegetables” *Financial Post* (May 29, 2017), online: <<http://business.financialpost.com/commodities/agriculture/it-says-product-of-canada-but-is-it-the-growing-problem-of-ferreting-out-counterfeit-vegetables>>.

¹³ Luke Denne & Tiffany Foxcroft, “‘People are being duped’: CBC exposes homegrown lies at farmers markets” *CBC* (September 29, 2017), online: <<http://www.cbc.ca/news/business/farmers-markets-lies-marketplace-1.4306231>>.

¹⁴ *Food and Drugs Act*, *supra* note 7 and Regulations; *Consumer Packaging and Labelling Act*, *supra* note 8 and Regulations; *Organic Products Regulations*, *supra* note 9; *Canada Agricultural Products Act*, RSC 1985, c 20 and Regulations; *Meat Inspection Act*, RSC 1985, c 25 (1st Supp) and Regulations; *Fish Inspection Act*, RSC 1985, c F-12 and Regulations.

¹⁵ *Safe Food for Canadians Act*, SC 2012, c 24.

While the CFIA has the power to prosecute most instances of greenwashing, the CFIA prioritizes prosecutions for high risk mislabelling.¹⁶ For instance, mislabelling that threatens food safety is a significant concern of the CFIA.

The CFIA is also focused on the prosecution of false claims about the attributes of food products, including preventative health impacts¹⁷. CFIA will prosecute companies or individuals for mislabelling food as “certified organic.” The use of the “Certified Organic” symbol requires compliance with the *Organic Products Regulations, 2009*, which sets out processes and ingredient that may or may not be implemented.¹⁸

Given its significant food-safety mandate, CFIA targets food adulteration and substitution matters. The prosecution of deceptive claims that relate to consumer values, such as mislabelling food as “natural”, “local”, or “free range”, is often deferred to local jurisdictions.¹⁹

Food producers can also be prosecuted by the Competition Bureau for false claims about health impacts and attributes of food products. The Competition Bureau can prosecute companies for deceptive representations aimed at promoting a product or business interest under the *Competition Act*²⁰ and the *Consumer Packaging and Labelling Act*.²¹

Market competitors are and will continue to play a key role in keeping food labelling in compliance. Often, food producers pay a premium to be in regulatory compliance or to meet certification standards. Where a food producer benefits from not complying and misrepresents their products, competitors have a strong incentive to report such behaviour to the Competition Bureau.

Provincial Laws

Provincially, there are a number of consumer protection and industry bodies which oversee the regulation of food labelling and marketing. Such bodies include:

- ◆ Foodland Ontario
- ◆ Ontario Food Protection Association
- ◆ Food and Beverage Ontario
- ◆ The Organic Council of Ontario

¹⁶ Tammy Switucha, “Updates on *Safe Food for Canadians Act*” (Taking Stock: The State of Food Law and Policy in Canada delivered at the Faculty of Law, University of Ottawa, November 3, 2017) [unpublished].

¹⁷ *Ibid.*

¹⁸ SOR/2009-176.

¹⁹ *Ibid.*

²⁰ *Competition Act*, RSC 1985, c C-34.

²¹ *Consumer Packaging and Labelling Act*, *supra* note 9.

- ♦ Various provincial marketing boards like the Ontario Fruit and Vegetable Growers' Association, and Ontario Greenhouse Vegetable Growers.

These groups often fill the gap to identify and prosecute greenwashing claims that are of lower priority for the CFIA.

As set out in the Mucci example above, defendants were ultimately convicted of mislabelling produce, but it was the Ontario Greenhouse Vegetable Growers Association private sanction against Mucci that raised the most eyebrows. Notably, the marketing board's fines were even greater than those of the court following conviction, demonstrating the value that Ontario's marketing boards place on their brand.²²

Absent regulatory prosecution, greenwashing can still harm a company's reputation. Given recent investigations into food fraud, we will likely see increased public interest in understanding the source of food products. Accordingly, consumer opinion, traditional media, and social media will play an increasingly important role in shining a spotlight on labelling practices and food greenwashing claims.

[Richard Butler](#), is a partner at Willms & Shier Environmental Lawyers LLP in Toronto. Richard may be reached at 416-862-4837 or by e-mail at rbutler@willmsshier.com.

[Giselle Davidian](#), is an associate lawyer at Willms & Shier Environmental Lawyers LLP in Toronto. Giselle may be reached at 416-646-4894 or by e-mail at [gdavidian@willmsshier.com](mailto:g davidian@willmsshier.com).

[Serin Remedios](#), is an associate lawyer at Willms & Shier Environmental Lawyers LLP in Toronto. Serin may be reached at 416-862-4823 or by e-mail at sremedios@willmsshier.com.

The information and comments herein are for the general information of the reader only and do not constitute legal advice or opinion. The reader should seek specific legal advice for particular applications of the law to specific situations.

Document #: 1308670

²² Mucci International, *supra* note 11.