



Canada and the U.S.:

Differences in Environmental Law

Constitutional Structure

- Canada is a federal country in which both the federal and provincial governments have jurisdiction over environmental matters. To some extent this jurisdiction overlaps (e.g. both levels of government have laws in respect of water pollution); other matters are more clearly assigned to one level of government or the other (e.g. the federal government has exclusive authority over nuclear power and the import and export of toxic substances and of hazardous waste and hazardous recyclable waste).
- In Québec, the civil law (i.e. the law of torts, contracts and property) is governed by the Civil Code of Québec; in the other nine provinces, the unwritten common law applies with some statutory modifications.
- Aboriginal rights are entrenched in the Constitution. One consequence is the government's duty to consult with and accommodate Aboriginal groups when considering whether to approve certain proposals by private sector developers.

Climate Change

- Canada, unlike the U.S., is a party to the Kyoto Protocol – but a firm regulatory basis to meet our greenhouse gas reduction targets is still in the works. Although the federal government has tabled an action plan, as of yet, there are no federal limits on greenhouse gas emissions, and the plan, as proposed, will not meet our Kyoto commitments by 2012.

Contaminated Land

- Liability for contaminated land is generally not based on fault. For example, in Ontario, the environmental authorities may order anyone who has or had “charge, management or control” over a site (e.g. a current or former owner or tenant) to clean it up, even if the contamination was caused by someone else.
- In some provinces, it is possible to obtain a measure of protection from regulatory liability so long as the site is cleaned up to applicable standards (e.g. the Ontario “Record of Site Condition” or the Quebec “Notice of

Contamination” and “Notice of Decontamination” process). However, no province offers any protection from civil liability to third parties. Thus someone who cleans up and redevelops a contaminated site could still face claims by neighbours or subsequent purchasers.

Waste Management

- Although Canada is a big country, we have struggled to find places to put our garbage. In Ontario there is talk of a looming waste management crisis. Ontario currently exports a significant proportion of its waste to the U.S., in particular Michigan. Recent initiatives in many Canadian provinces have focused on waste diversion

Environmental Litigation

- Canada has a “loser-pays” system – the losing party normally must pay much of the legal costs of the winning party. Partly as a result of this, Canada is generally less litigious than the U.S.

Environmental Offences

- Breaching some environmental laws is an offence. In Ontario corporations convicted under the Environmental Protection Act or the Ontario Water Resources Act can be fined up to C\$6 million for each day on which the offence occurs. For a subsequent offence, the maximum fine is C\$10 million per day. An individual is subject to a fine of up to C\$4 million per day or, for a subsequent offence, a fine of up to C\$6 million per day and/or up to five years in prison. In practice, fines are normally much lower, and jail time is rare. Environmental offences in Canada are considered as “strict liability offences” that allow the offender to present a due diligence defence whereby evidence can be advanced by the offender that all reasonable measures were taken to avoid the offence from being committed.

Director and Officer Liability

- Under several federal and provincial environmental statutes, directors and officers have a positive duty to ensure that the corporation abides by environmental law, and may be personally charged for certain environmental breaches.

For further information, please contact:

Paul R. Granda

Montreal

(514) 392-9598

paul.granda@gowlings.com