

Rea\$on\$ To Go Green

By Barry Weintraub

Concern for the environment is an important part of today's business climate in Canada. It wasn't always so. Previous generations seemed to take the environment for granted, secure in the knowledge that nature's resilience would overcome man-made pollution. The aftermath of World War II brought a tremendous explosion in the industrial capabilities of the Western World, and an increased ability to harm the natural environment. This led many to become concerned, particularly in the sixties, and this concern spread throughout the general population.

Public opinion polls in the last 25 years have consistently shown the protection of the environment to be an important issue to Canadians and our governments have responded by paying more and more attention to the environment. As a result, there has been a steady and expanding array of programs and approaches to the issue.

From the passage of Environmental Protection Acts in various jurisdictions in the early '70s, laws regulating a business' impact on the environment have been in place, and all levels of governments have become increasingly active in recent years. On top of that, the international community has become attuned to environmental issues as well, developing various international standards and agreements, including the Kyoto Accord, with the promise of more to come in the future.

In large measure, the environmental protection legislation and regulations of the past 35 years have been designed to force businesses to clean up after themselves and ensure that the true costs of products are paid by those responsible for making and using them. For businesses, this was not always a welcome reform, but the impact on business has been profound. The reality is that it is no longer acceptable for businesses to avoid incurring costs to clean up any damage to the environment caused by their activities.

For businesses today, there are many sound economic reasons to “get with the program”, and the costs of failing to do so can be crippling.

Following are the top ten reasons for Canadian businesses to “go green”.

1. Market Growth in Environmentally-Friendly Products

Experience has shown that businesses have been able to pass on to consumers the added costs of environmental compliance. In addition, since any one business’ competitors are also required to comply with environmental laws, individual businesses in a market place are not singled out. Products harmful to the environment carry added costs, making them more expensive. At the same time, more environmentally friendly alternatives do not have these added costs and have met with great success in the market place. Canadians have shown they will pay more for environmentally friendly products.

2. Reputation Is An Important Part of a Business’ Value

The value of a business is very much affected by its reputation with its customers, and no business can afford to ignore concern about the environment. The consuming public will vote with their pocket books in favour of businesses who demonstrate shared values in this area. Conversely, those businesses seen as shirking their responsibility will be made to pay. Many consumers have made the link in their minds between environmental friendliness on the one hand and health and safety on the other, and make their purchasing decisions accordingly.

3. Good Environmental Management Improves Efficiency

Complying with environmental regulation and putting in place a proper due diligence program to avoid environmental incidents requires businesses to take a serious look at their operations, including their product inputs and waste streams. Numerous businesses have found that in the

course of doing this, they have been able to eliminate inefficiencies in their operations and realize savings and profits by diverting or better utilizing their waste streams and by making important capital investments. What can start out as an unwanted compliance cost can often be turned into a valuable exercise in rethinking and renewing business operations. In addition, reducing wastes can often lead to the development of additional products from diverted wastes. If nothing else, businesses can improve their bottom line by reducing packaging and therefore space requirements for their inventory of products.

4. Government Incentive Programs

Various governments at all levels from time to time fund incentive programs to encourage businesses and citizens to make capital improvements which will enhance environmental protection, reduce energy consumption and encourage renewable energy sources. Examples of such programs at the federal level include the Renewable Energy Deployment Initiative, The Commercial Building Incentive Program and the Wind Power Production Incentive. In addition, grants are available for environmental research and to develop environmental technologies. These programs may have helped spur the growth of many businesses in environmentally friendly areas, although many question their effectiveness.

5. Compliance Cannot Be Avoided

An important reason for businesses to be environmentally responsible is that the law requires it. It is clear that environmental protection laws are here to stay. If anything, they will become more stringent as the years go by and additional elements of environmental protection are addressed.

In the last few years, we have seen the traditional concern with waste disposal and protection of rivers augmented by concern for other less obvious aspects of the environment, such as the protection of ground water and air emissions. The recent Kyoto Accord on greenhouse gases was part of this phenomenon. Regardless of the future of the Kyoto Accord, the alternative is

not the absence of regulation of greenhouse gas emissions, but rather regulation in a different form. All indications are that this is the present direction that the Canadian government intends to follow, consistent with the experience in the United States where jurisdictions such as California have led the way with controls on the emissions of greenhouses gases that in many cases go beyond what is contemplated by the Kyoto Accord.

6. Violating Environmental Laws Can Bring About Costly Fines

Businesses who violate environmental laws will be prosecuted and conviction rates have been high, often resulting in substantial fines and even imprisonment. Although the specific amounts of fines vary with the severity of each particular incident of non-compliance and the record of the business charged, the overall trend is for increased fines. This has been prompted by numerous legislative changes. It is good politics for legislatures to increase fines for those who are not in compliance with environmental protection laws, and increases in the maximum fines and the imposition of minimum fines have had the effect ratcheting up the amount of fines that are assessed by courts and tribunals.

7. Defending Yourself Can Be Expensive

In the event of charges being laid for a regulatory offence, the Supreme Court of Canada has decreed that those charged in most cases have a right to put forward a defence of due diligence. That is, it is always open to those charged to prove that they did everything reasonably possible to prevent the occurrence, and if this is done, a conviction can be avoided. While this seems fair, as prosecution for an accident is harsh, the reality is that to establish a due diligence defence is an expensive undertaking, often outweighing the ultimate fine that would be imposed on a guilty plea. Since fines tend to escalate with repeat incidents, however, businesses are often faced with the need to carry out an uneconomic defence by proving that they were duly diligent, so as to avoid the much higher fines that would occur on repeat incidents.

8. Administrative Penalties

In future, it is likely that environmental regulation will increasingly move in the direction of more and more economic-based regulation, with less of an emphasis on fault. This has already started with administrative penalties in Alberta for minor violations, and the recent introduction in Ontario of environmental penalties legislation. Regulations soon to be introduced will provide for a set schedule of penalties to be paid for particular violations, depending on the amount of contaminant released, the nature of the violation and the record of the business involved. There will be no due diligence defence, except in considering the amount of the penalty to be imposed. These developments in Canada follows the lead of the Environmental Protection Agency in the United States, and are consistent with legislative directions in other areas of regulation in Canada. For example, in the area of competition law, the use of monetary penalties for specific offences on an absolute liability basis (that is, with no defence of due diligence) is now commonplace. It is likely that other Canadian jurisdictions will ultimately follow the lead in this regard.

Businesses who do not or cannot comply with environmental laws pay the bill through environmental penalties, as they will likely be popular with regulators, in a manner similar to speeding tickets or parking fines.

9. Clean Up Costs

In the event of incidents which harm the natural environment, businesses are required to clean up their property. This often involves hiring consultants to oversee clean up operations, administrative orders and required approvals, extensive costs and a lengthy remediation. This can potentially interrupt business operations for a considerable period of time and can hurt the reputation and good will of a business.

10. Avoiding Civil Liability

In addition to costs imposed by regulators and the cost of cleaning up one's own property, failing to pay attention to environmental concerns can result in civil liability to a business' neighbours, suppliers and customers. The law gives people the right not to have their property or person adversely affected by the spread of contamination from a neighbour's property or products. Recent court decisions have clarified that in such instances the polluting property owner is liable to compensate those affected for the cost to remediate any damages they suffer. In the case of land, this includes a neighbour's land to its "pristine condition" prior to the release, even if a lesser standard of remediation would be permissible for the polluter's own land. There can also be liability to neighbours for stigma that harms the value of their property in certain circumstances.

Conclusion

As Kermit the Frog said, "It's not easy being green", but the benefits of doing so far outweigh the disadvantages of not doing so. Those businesses who fail to comply with environmental obligations will be made to pay and will miss out on the opportunity to profit in an environmentally conscious world.