# *Voluntary Approaches, the Environment and the Law: A Canadian Perspective*

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**Document represents the authors opinions and not those of the Office of Consumer Affairs, Industry Canada or the Government of Canada**

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## Introduction

It may be thought that because a firm or group of firms agrees voluntarily to adhere to a set of environment-oriented commitments which are not a direct part of a legislative or regulatory regime, then there are no legal implications to such arrangements. In fact, there are many ways in which the law may affect voluntary initiatives. For example:

- oftentimes, the impetus for voluntary initiatives is the perception that, if action is not taken by those within in a particular sector, then legislation is likely to follow.
- if a voluntary initiative should be considered by government officials to be ineffective or unlikely to succeed, it may be eclipsed by a regulatory initiative.
- voluntary standards or arrangements can be referentially incorporated in law, with or without the approval of the original authors.
- in other situations, voluntary initiatives may elaborate and refine the generality of legislative requirements.
- in regulatory enforcement actions undertaken by government, the existence of a voluntary standard can assist in obtaining convictions or avoiding penal liability.
- consumers or affected members of a community may be able to use the existence of a voluntary initiative in a legal suit in contract or tort to establish liability and obtain remedies, against individual firms and potentially the Crown in certain circumstances.
- firms may be able to bring legal actions in tort or contract against other firms on the basis of a voluntary arrangement.
- voluntary arrangements may conceivably have competition law implications.

As even this brief listing illustrates, voluntary approaches can frequently act as adjuncts to the legal system, with significant legal effects, whether or not this was intended. In light of the varied ways in which voluntary arrangements and the legal system may be inter-linked, it is not inaccurate to say that voluntary arrangements operate in the shadow of the law. At a very basic level, much of the effectiveness of voluntary environmental initiatives may stem from the fact that they have legal implications.

This paper is organized into two main components. The first consists of a function-based comparison of voluntary and regulatory approaches as rule systems. Analysis suggests that regulatory approaches tend to be advantageous in terms of visibility, credibility, accountability, compulsory application to all, including "free riders" (i.e., to those who might not wish to participate in a voluntary, consent-based system), greater likelihood of rigorous standards being developed, cost spreading (i.e., normally, all of society bears the costs of putting in place and operating regulatory regimes), and availability of a range of sanctions (state-imposed coercion can be used). However, regulatory approaches tend to be highly formal, expensive to operate, may foster adversarial relations between regulator and regulated, have limited scope (i.e., there may be jurisdictional limits on what a legislator can regulate), and usually are difficult to develop and amend (i.e., the rule making and amendment process is both slow and expensive).

The main potential advantages of voluntary systems centre around their flexibility, lower cost (i.e., the taxpayer does not directly assume any costs, and the institutions of rule making, implementation and dispute resolution may be less expensive to operate), speed in establishing and amending rules and structures, avoidance of jurisdictional concerns (e.g., it is possible to devise

systems with multi-jurisdictional application), potential for positive use of peer pressure and internalization of responsibility, and informality. Typical drawbacks of voluntary approaches include generally lower visibility, credibility, difficulty in applying the rules to free riders, less likelihood of rigorous standards being developed, uncertain public accountability, and a more limited array of potential sanctions.

The comparisons undertaken in the paper suggest that, while for some analytical purposes it is useful to treat laws and voluntary approaches as opposites, in practice the two can and do operate in tandem; often with positive effects, one complementing the other. This is not to suggest that this is always the case; the paper attempts to identify areas of conflict, and suggests methods for avoiding such problems. It is also important to recognize the tremendous variety within voluntary approaches: some are initiated at the behest of government, others independently of government, some are adjuncts and refinements to statutory regimes, others have no direct connection to legislation, some apply to only one firm, others apply to many, even across jurisdictional boundaries. In light of this variety, it is useful to view voluntary approaches on a continuum, with some quite closely resembling statutory command-and-control structures at one end, while at the other are voluntary arrangements which draw more on market pressures as stimuli for development and implementation. The reader should also bear in mind that with such a wide variety of voluntary arrangements in existence, the general observations made in this paper concerning voluntary approaches may apply to some types of codes more than others.

. The second part of the paper focuses on the legal implications of use of voluntary arrangements. An examination of the applicability of contract law to voluntary arrangements highlights the consensual nature of such systems, and suggests that actions based in contract may be used by consumers, standards organizations, individual firms, and associations to require that voluntary commitments are kept. A potentially significant conclusion emerging from tort law analysis is that, in spite of their consent-based nature, voluntary arrangements can be used by courts to impose standards and impose liability on parties who did not necessarily agree to be bound by the original voluntary arrangement. Voluntary arrangements may also be relevant to regulatory enforcement actions, particularly to due diligence defences. If a voluntary system significantly decreases the ability of non-participating competitors to access a market and sell their products and services, this may violate competition laws.

Taken together, this analysis suggests that individuals, firms, non-governmental organizations, and governments need to thoroughly explore the legal implications of voluntary arrangements before undertaking or participating in such initiatives. It is possible to devise and operate voluntary regimes which serve *both* the public and private interests involved, but failure by all parties to properly consider the legal implications and act accordingly could potentially result in problems for all concerned.

## Part One:
## Comparison of Regulatory and Voluntary Code Regimes as Rule Systems

As understood for the purposes of this paper, both regulatory and voluntary regimes

consist of a grouping of institutions and mechanisms created to carry out the functions of rule creation, administration and dispute resolution, which are designed to affect the behaviour of a defined population. In view of the tremendous variation possible from one voluntary or regulatory regime to another, the comparisons of the two types of rule systems which follows is of necessity conducted at quite a high level of generality. However, the comparative charts which are set out in the next few pages, while summary and general in nature, can be used to test specific regimes. Indeed, in the discussions which follow, an attempt has been made to refer for illustrative purposes to a number of voluntary arrangements which were the subject of case studies as part of an Office of Consumer Affairs, Industry Canada and Regulatory Affairs, Treasury Board, research program.[1] Three of those case studies were directly environmental in nature, and so they are briefly described below.

**The Environmental Choice Eco-Logo Program**[2]

This is a contractual based initiative spearheaded by the Canadian federal government. Following extensive consultations with affected stakeholders, standards have been set for certain products (e.g., percentage recyclable material used, what constitutes recyclable, etc.). If a firm's products meet these standards, the firm may apply to use the eco-logo on its products, and pay for the privilege of using the logo. Firms using the logo are also subject to occasional third party verification processes to determine whether they are in compliance with the standards. Consumers looking for a reliable indication that a product is environmentally less harmful than others may choose products with the Eco-logo over others which perhaps make similar claims but do not use a third party standard to support their representations.

**The Responsible Care Program**[3]

This program was originally established by the Canadian Chemical Producers' Association (CCPA), at least partially to counter the negative image and publicity surrounding the chemical industry following a series of chemical-oriented mishaps in the 1980s. The Responsible Care program is now in operation in over 40 countries worldwide. It is a package of policies, principles, bodies and codes of practice -- a management system. Adherence to the Responsible Care commitments is a condition of membership in the CCPA. Standards were developed with advice from environmental representatives. The compliance verification process involves use of industry and environmental representatives.

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[1] For more information, contact Kernaghan Webb, Team Leader, Voluntary Codes Project, Office of Consumer Affairs, Industry Canada, phone (613-952-2534, internet: webb.kernaghan@ic.goc.ca

[2] K. Harrison, *Eco-Labelling and the Environmental Choice Program*, in D. Cohen and K. Webb, eds., ***Exploring Voluntary Codes in the Marketplace*** (Ottawa: Government of Canada, publication forthcoming).

[3] François Bregha and John Moffet, *Canadian Chemical Producers Association Responsible Care Program* ,in D. Cohen and K. Webb, eds., ***Exploring Voluntary Codes in the Marketplace*** (Ottawa: Government of Canada, publication forthcoming).

**Sustainable Forestry Management Certification System**[4]

The Canadian Standards Association (CSA), working with Canadian forestry companies, environmental groups, aboriginal groups, and others, is finalizing a set of standards on sustainable forestry management (SFM) practices which allow firms which contractually adhere to its terms to signify on their products that those products were made from forests harvested in a sustainable manner. The actual standards necessitate that forestry companies work with local communities to determine appropriate forestry practices for that area. The CSA SFM approach could be particularly useful to counter consumer boycott-type actions aimed at discouraging the purchase of goods from certain companies.

The tremendous variation in voluntary approaches is evident even from this brief description of the three programs. The Environmental Choice program is essentially a contract-based consumer oriented arrangement, where the State has played an instrumental role in establishing the standards and putting the program in place. The State has in effect acted as a third party guarantor that the environmental claims made on products have merit. The Responsible Care program has no direct government component (although the threat of new legislation being enacted underlies it), is essentially operated by an industry association, involves third party compliance verification, and may set an industry standard in tort or in penal law which applies beyond its membership. The CSA sustainable forestry management standard was established by a third party standards organization, is designed to operate in the international marketplace, beyond the effective legislative jurisdiction of any individual state.

With this background, we will now begin the comparison of the characteristics of voluntary and regulatory approaches as rule systems, looking at their rule creation, adminstration, and dispute resolution functions.

**Rule Creation**

As the chart below demonstrates, the rule creation function can be considered from a number of perspectives. Generally speaking, the regulatory rule creation function, which consists of statutes and regulations, is carried out by pre-existing institutions (e.g., Parliament, legislatures, Cabinet, regulatory agencies) possessing a high degree of credibility and visibility in Canadian society. It is, of course, possible for government to create new regulatory rule-making bodies, and indeed Canadian governments have done so from time to time. For example, currently, federal and many provincial governments are considering the creation of a new national securities agency.

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[4]Gregory T. Rhone, *Canadian Standards Association Sustainable Forest Management Certification System (SFM)*, in D. Cohen and K. Webb, eds., ***Exploring Voluntary Codes in the Marketplace*** (Ottawa: Government of Canada, publication forthcoming).

| Characteristics | Laws | Voluntary Codes |
|---|---|---|
| ***Rule Making Institutions*** | Pre-established<br>-more credibility | May be newly established<br>-less credibility |
| ***Visibility of Process*** | High | Lower |
| ***Cost*** | High<br>-but spread across society | Lower<br>-but borne by a smaller group |
| ***Development Process*** | Difficult<br>-highly formal, expensive, democratic<br>-theoretically open to all | May be easier<br>-less formal, less expensive<br>-may not be open to all |
| ***Ability to Make Amendments*** | Difficult<br>-see above | Easier<br>-see above |
| ***Sanctions Which can be Attached*** | Can include coercive sanctions<br>-including imprisonment | Primarily market-based<br>-may be tort and contractual liability implications |
| ***Scope of Application*** | Can be imposed on free-riders<br>-system not based on contractual consent | Difficulty with free-riders<br>-system based on contractual consent |
| ***Constraints on Rule Development*** | Considerable<br>-constitutional and procedural | Few<br>-may apply across national and provincial boundaries |

| | | |
|---|---|---|
| ***Likelihood of Rules*** | Political process makes outcomes | Closed, limited process makes |
| ***Ultimately Being*** | difficult to predict | outcomes easier to predict |
| ***Developed Through*** | | |
| ***the Process*** | | |
| ***Likelihood of*** | High | Low |
| ***Rigorous Standards*** | -rules established by outside interests | -rules established by parties |
| ***or Obligations*** | -less chance for bias to affect | which will be affected |
| ***Being Developed*** | the development of standards | |

The function of rule making in a voluntary context may necessitate creating new bodies (e.g., the formulation of a new association tasked with the rule making responsibility), or it may be undertaken by an existing body, be it an individual firm[5], an association of firms[6], or a standards organization.[7] Typically, these types of bodies do not have the visibility or credibility of pre-established governmental institutions, but in some respects this can be considered advantageous in that voluntary code rule-making bodies are forced to earn their credibility and visibility. For example, the Canadian Standards Association has become an organization respected and recognized by consumers, the private sector and governments, for its work over the years in standards development.

Largely because of the formality of governmental rule-creation processes, statutes and regulations are generally slow and expensive to develop. Part of this deliberateness and expense is a by-product of their formality and openness, and the attempt to establish checks and balances to ensure that the process is accessible, fair and transparent, and is perceived as such. This undoubtedly adds to their credibility and visibility. While expensive, the costs of developing statutes and regulations are borne by all taxpayers, and thus there is a "cost spreading" effect at work. There is also a high publicity value to use of the formal law-making processes.

In contrast, the rule development process for voluntary codes may be considerably quicker

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[5] Gregory T. Rhone, *The Gap Inc.: Sourcing Principles and Guidelines (The Gap)* in D. Cohen and K. Webb, eds., ***Exploring Voluntary Codes in the Marketplace*** (Ottawa: Government of Canada, publication forthcoming).

[6] See, e.g., Colin J. Bennett, *Privacy Codes of the Canadian Bankers Association and the Canadian Standards Association*, Office of Consumer Affairs. Allan McChesney, *Voluntary Standards and Dispute Resolution in Canada s Cable Television Industry*, in D. Cohen and K. Webb, eds., ***Exploring Voluntary Codes in the Marketplace*** (Ottawa: Government of Canada, publication forthcoming).

[7] See, e.g., discussion of standards associations in J. Buchanan, A. Morrison, and K. Webb, ***Bike Helmet Standards and Hockey Helmet Regulations***, and in Gregory T. Rhone, *Canadian Standards Association Sustainable Forest Management Certification System (SFM)*, in D. Cohen and K. Webb, eds., ***Exploring Voluntary Codes in the Marketplace*** (Ottawa: Government of Canada, publication forthcoming).

and less expensive than for regulatory regimes. The process may be quite informal, but also may not be accessible to all who are affected, nor may its mode of operation be very visible, or well understood (e.g., consensus, majority rule, draft versions circulated for comments, etc.). This, of course, may affect the credibility of the rules developed, since it would be easy for those who were not given the opportunity to participate or are not given an explanation as to its mode of operation to assume that an inadequate fait accompli was devised among like-minded insiders.[8]

This need not be the case, however, since it is possible for firms, associations, and standards organizations to put in place transparent, accessible, fair and easy to understand rule development processes.[9] It perhaps goes without saying that the more transparent, accessible, fair and easy to understand the rule development process is, the more expensive it tends to be. Thus, although voluntary code rule making may be considerably less costly than regulatory rule making, it can still be an expensive proposition. And since costs are borne principally by the rule-makers (e.g., a firm or group of firms), and not all taxpayers, there is less of a "cost spreading" capability than is the case with regulatory decision-making. As long as markets are adequately competitive most costs borne by rule-makers are likely to be passed on to the ultimate consumers of products and services, in the form of higher prices. Thus, the discipline of the market is likely to push firms to attempt to minimize rule-making costs and cut corners. In the long run, however, it may be a worthwhile investment to be as open, etc. in voluntary code rule-making, since this will decrease the likelihood of criticisms and problems arising later on.[10]

In this regard, for the task of rule-making, making use of standards making organizations such as the CSA may represent an attractive option in some situations.[11] Their credibility and experience in developing standards, their use of matrix models to ensure balanced representation, and their employment of public consultation strategies can help answer the need for transparent, fair, accessible and understandable rule-making.[12]

With respect to sanctioning options, the State has a monopoly on the use of coercion, which means that only through the State pursuant to processes which meets standards of fundamental justice can anyone be deprived of their liberty or security of person (e.g., be jailed, or detained, or have their liberty curtailed).[13] However, a wide variety of sanctions short of coercion

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[8] Greg Rhone, *Canadian Tobacco Manufacturers Council Tobacco Industry Voluntary Packaging and Advertising Code (Tobacco)*, and François Bregha and John Moffet, *Canadian Chemical Producers Association Responsible Care Program*, Bennett, 22, in D. Cohen and K. Webb, eds., ***Exploring Voluntary Codes in the Marketplace*** (Ottawa: Government of Canada, publication forthcoming).

[9] An example of a fair and accessible development process was the CSA's Sustainable Forest Management initiative which was the largest consultation process undertaken by the CSA. In addition to consulting with a large number of groups, the CSA paid the expenses of a number of groups which otherwise could not have participated. Rhone, *SFM*.

[10] See, for example, the criticisms of the CMTC code discussed in: Rhone, *Tobacco*, 3.

[11] Rhone, *SFM*, 2.

[12] Rhone, *SFM*. However, it should be noted that the rule-making processes of standards organizations are not flawless.

[13] *Canadian Charter of Rights and Freedoms*, s. 7.

are available to private sector actors, including fines, incentives, withdrawal of association priviledges and membership, and adverse publicity. These sanctions will be discussed in greater detail later in the paper in the examination of dispute resolution.

A key distinction between regulatory and voluntary code rule-making is the former`s ability to develop rules which apply to all actors in a sector, and the latter`s problems with free riders. Ultimately, a voluntary regime is a consent-based arrangement. It is therefore not possible for a group of firms to compel compliance with a voluntary code on a firm which has not agreed to participate in the voluntary code arrangement.[14] As is discussed in Part II of the paper, it *is* possible that the standards contained in a voluntary code regime will be applied by a court on a non-participating firm through an action in tort or through a regualtory prosecution, but the voluntary code makers cannot on their own compel non-members to comply with a voluntary code.

Governments can only establish laws to the extent of their authority. They cannot create a a set of rules if they do not have the constitutional authority to do so. Thus, for example, a province cannot normally create a rule-regime applying specifically to banks, because banks are a federal responsibility.[15] Moreover, neither federal nor provincial governments can create legislation which is extraterritorial in effect. Thus, for example, it is not possible in a direct manner for a Canadian government to require a company in El Salvador to meet Canadian labour or environmental standards, but a Canadian *company* can require its El Salvadorian suppliers to meet Canadian standards, as a term of contract.[16]

A group of firms operating in several countries can establish a voluntary code which applies in multiple jurisdictions (as long as competition and company laws are not being violated). Thus, for example, the Responsible Care program operates not only in Canada, but also in thirty-five other countries.[17]

From a predictability standpoint, because of the formal, lengthy nature of legislative and regulatory rule-making, with its many checks and balances, there are considerable opportunities for rule-making projects to be de-railed. On the other hand, once there is agreement within or among firms to establish a voluntary code arrangement, there are fewer obstacles to prevent those rules from being promulgated.

A final point concerning rule-making pertains to the content of the rules themselves. Although Members of Parliament, Members of Legislative Assemblies, and civil servants all may

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[14] It is for this reason (among others) that the CDMA abandoned attempts at a voluntary privacy code, and instead now advocates legislated privacy standards, in the interests of a level-playing field with rules applying to all)

[15] The *Quebec Privacy Act*, applies to all the private sector, but does not apply to banks.

[16] The GAP clothing company requires its suppliers to meet particular standards for working conditions. Rhone, *The Gap*, 4.

[17] Bregha and Moffet, 2.

have particular viewpoints, and may be influenced by the views of others through lobbying activity, in the final analysis they are not employees of particular firms. Moreover, they are accountable, directly in the case of elected members, and indirectly in the case of civil servants, to the electorate they serve.

In contrast, the individuals in the private sector who are charged with the responsibility of drafting voluntary codes are paid by firms, and those firms are accountable ultimately to their shareholders, and to their customers, who buy their products and services. As a result, decisions made as to the content of particular rules made by legislators or civil servants on the one hand, and representatives of private firms on the other, tend to reflect their respective constituents. All other things being equal, one can expect greater rigour in the substantive obligations imposed on regulated actors than one can expect in the substantive obligations imposed by firms on firms.

There is another way in which legislative and voluntary code approaches to rule-making content may be different. Typically, laws must be written in precise, detailed language. If they are not, it is possible that the laws would be held void for vagueness, and therefore unconstitutional.[18] On the other hand, voluntary codes can be written in considerably more general language. This can be advantageous when the activity which is to be addressed is highly variable, and defies easy definition. Thus, for example, the Canadian Advertising Foundation has put in place rules concerning advertising which is in "bad taste."[19] It would probably be very difficult, and perhaps not desirable, to attempt to discourage "bad taste" through laws.

In the United Kingdom, a voluntary regime for controlling the acquisition of publicly listed companies has been in existence for many years.[20] The regime sets out general principles, rather than detailed provisions. In a recent court case, judges have remarked on the apparent effectiveness of this approach.[21]

Of course, lack of precision can also become an excuse for non-compliance, where variable interpretations are possible, and no one can agree on the correct interpretation. Therefore, the fact that it may be possible to establish less precise obligations for voluntary codes than for laws is not necessarily advantageous.

It is also worth pointing out that in the short run the existence of a voluntary code arrangement may decrease the likelihood of regulatory action taking place. In this sense, the rule-creating process of voluntary codes may be viewed as a delay tactic, intended by certain parties to

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[18] A law must not be so vague that a court cannot give "sensible meaning" to its terms. *Re ss. 193 and 195.1 of Criminal Code (Prostitution Reference)* [1990] 1 S.C.R. 1123 at 1160.

[19] Iain Ramsay, *Advertising Self-Regulation*,in D. Cohen and K. Webb, eds., ***Exploring Voluntary Codes in the Marketplace*** (Ottawa: Government of Canada, publication forthcoming).

[20] *R. v. Panel on Take-overs and Mergers* [1987] 1 All E.R. 564.

[21] *Ibid*, 567.

avoid needed regulatory action.[22] While there is undoubtedly a need to be alert to this type of strategy, it is also possible that the rules developed through voluntary code arrangements can become the basis for legislative action. Recently, the Ontario Securities Commission has announced its intention to make a voluntary code regarding mutual funds mandatory.[23] As well, there have been recommendations by a government-sponsored advisory council on the Information Highway that a CSA Model Privacy Code, developed as a voluntary initiative, become the basis for framework legislation.[24]

**Rule Administration**

Since most of the same characteristics are at play for rule administration in the same manner as they are for rule creation, it is not necessary to elaborate on each of them again here, beyond the summary itemization contained in the comparative chart provided below.

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[22] Rhone, *Tobacco*, 2.

[23] A. Bell, "OSC to move fast on new fund code," Globe and Mail, July 10, 1996.

[24] Information Highway Advisory Council, Connection Community Context (September 1995) 141.

| Characteristics | Laws | Voluntary Codes |
|---|---|---|
| ***Institutions of Administration*** | Primarily pre-established institutions | May use newly developed institutions or existing bodies |
| ***Visibility of Process*** | High | Lower<br>-can have procedures to ensure visibility such as public reporting requirements |
| ***Cost*** | High<br>-but cost spread across society | Lower<br>- but cost borne by a small group |
| ***Accountability*** | High<br>-scrutiny by Auditor-General<br>-responsible ultimately to Minister/Parliament | Lower<br>-depends on reporting requirements<br>-the market, public, and media are important |
| ***Constraints on Rule Administration*** | Considerable<br>-constitutional and procedural | Few<br>-varies by institution |
| ***Credibility*** | High | Tends to be lower |
| ***Investigation and Inspection Capabilities*** | Subject to *Charter* constraints<br>-may have extensive powers | Subject to consent of parties<br>-may have extensive powers |
| ***Sanctions for non-cooperation in administration*** | May include coercive measures | May be more limited<br>-consent based system |

| | | |
|---|---|---|
| ***of rules*** | | |
| ***Formality*** | Normally high | Variable |
| ***Likelihood of*** | High | Low |
| ***Rules Being*** | -in a law abiding society few wish to be | -pressure to comply is derived primarily |
| ***Followed*** | seen in violation | from peers and market perceptions |

Without effective rule implementation, there is undoubtedly potential for voluntary codes to become little more than "window dressing," used only for marketing purposes. This type of short-term strategy, however, can backfire on its proponents. For example, The Gap clothing store had a voluntary code which stated that it would not contract with suppliers who used unfair labour practices. The Gap was subsequently publicly embarrassed when a public interest group provided detailed accounts of the sweatshops used by Gap suppliers. With the threat of a boycott looming, The Gap agreed to rigorously enforce the code with the assistance of third party monitors.[25]

It is worth pointing out that regulatory regimes, like their voluntary counterparts, can be less than fully enforced. This strategy can backfire on regulators just as limited implementation of voluntary code initiatives can backfire on firms. Formal accountability mechanisms such as annual reports, Auditor General reports, inquiries, questions in the House to the Minister, and legal actions can all go some way toward revealing regulatory enforcement inadequacies. By the same token, there can be annual reports, investigations, and other types of publicity used in voluntary code settings.[26] Inclusion of public interest representatives in implementation oversight panels can also help to ensure that code compliance efforts are adequate.

In the final analysis, a key factor when considering rule implementation is an intangible factor which could be called a "compliance ethos." In Canada, laws are generally held in high regard. For the most part, few wish to be seen to be in non-compliance with laws. There may be no similar ethic or aura surrounding voluntary codes. As a result, there may be less perceived societal pressure for firms to comply with voluntary codes. This is not to suggest that there are not other incentives at work which will tend to encourage compliance with voluntary codes. There undoubtedly are. One is peer pressure. Since the rules are developed by firms, there may be considerable pressure from other firms to preserve the good image of the code and the

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[25] Rhone, *The Gap*, 3.

[26] Bregha and Moffet, 20-21.

industry.[27] There is potential for an internalization of responsibility to take place where voluntary codes are used which may be missing when rules are imposed by the agents of government. There may also be market pressure to comply, in the sense that bad publicity may harm sales.[28] Still, all things considered, the societal pressure on firms and individuals to comply with laws and regulations is a substantial impetus which is not easily replicated in voluntary code contexts.

**Dispute Resolution**

The chart below summarizes the main points of distinction between regulation and voluntary code dispute resolution.

[27] Bregha and Moffet, 19.

[28] Rhone, *The Gap*, 11.

| Characteristics | Laws | Voluntary Codes |
|---|---|---|
| ***Institutions of Adjudication*** | Both pre-established and new | Primarily newly established bodies |
| ***Authoritativeness of Determinations*** | High | Variable |
| ***Ability to Enforce Judgements*** | High<br>-can use state sanctioned coercion | Variable<br>-limited ability to use coercive force<br>-can use market based sanctions |
| ***Structure*** | Tends to be centralized | Variable centralization |
| ***Application*** | Wide<br>-applies to all parties | Variable<br>-dependant ultimately on consent<br>-free rider problem |
| ***Cost*** | High<br>-spread across society | Variable<br>-borne by a small group |
| ***Formality*** | Tends to be high | Variable<br>-may be formal or informal |
| ***Credibility*** | High | Variable |
| ***Visibility*** | High | Variable |

| | | |
|---|---|---|
| ***Constraints*** | Considerable<br>-constitutional and procedural | Variable |

It is worth noting that governments, the courts, the private sector, and individuals are increasingly turning to private dispute resolution mechanisms, methods and institutions, in light of their advantages in terms of speed, cost, and their perception as being fair and effective. These private dispute resolution approaches -- be they mediation, ombuds-services, arbitration, and others -- depend to some extent for their success on the existence of court systems as a final resort. Thus, parties may engage the services of a private dispute resolution service because they wish to avoid the expense, slowness, uncertainty, adversarial nature, and formality of the courts. Yet those same parties may have some comfort in knowing that formal litigation remains a viable option, should alternative techniques be considered inappropriate. Furthermore, decisions reached through alternative dispute approaches may ultimately be imposed through the formal legal processes.

In voluntary code regimes, a wide range of approaches have been used to encourage compliance. Canadian Automobile Association members can make use of the CAA arbitration services for consumer disputes with participating garage owners. The Canadian Bankers' Association has announced that it will be establishing a consumer ombudsman, to complement those in place for individual banks.[29] For consumer disputes with respect to cable TV, the Canadian Cable Television Association has established a formal dispute resolution mechanism, which includes representatives from the cable industry, and from a public interest or consumer group.[30] Decisions (including dissenting opinions) are made public.

Formal and transparent approaches, which involve use of third parties (e.g., consumer, environmental group representatives, retired judges, experienced arbitrators), would appear to be have the most credibility in the eyes of the public. However, they may also be the most expensive, and are not always the most effective.

Although it is not possible in the context of a voluntary code regime for an association to impose penal sanctions such as imprisonment, a full panoply of other potentially effective

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[29] Bennett, 17.

[30] McChesney, 12.

techniques are available and are used, including fines,[31] publicity,[32] withdrawal of privileges such as access to certain databases or services,[33] orders of restitution and rectification,[34] and banishment from an association.[35]

# Part Two:
# Legal Implications of Voluntary Codes

## Contract Law and Voluntary Codes

As has been observed above, a key point of distinction between regulatory and voluntary code rule regimes is that regulations are imposed on the regulated population, whether or not the regulated population desires it, while voluntary code regimes are in essence consent-based regimes, so that only those parties who agree to participate in the arrangement are subject to it. In legal terms, a consent-based arrangement is known as a contract. A contract is formed when one party makes an offer which is accepted by another party and consideration is exchanged.[36] The existence of a contract has legal implications for the parties involved -- implications which translate into rights and obligations ultimately enforceable in court.

For purposes of voluntary code analysis, key issues include: when has a contract been made; what are the terms of the contract; who are the parties to the contract; and what are the remedies in law when terms of a contract have been violated.[37] In voluntary code arrangements, contracts can be formed in a variety of ways, with a number of different parties. These issues and variations are discussed below.

### *Industry Associations and Member Firms*

Perhaps the most obvious contract relationship created by voluntary code regimes is between industry associations and member firms. Typically, when member firms join an association, they must pay an annual membership fee, and agree to abide by whatever rules and standards are imposed by the association. In exchange, the member firms can advertise their

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[31] For example, some real estate boards discipline their members through fines.

[32] Ian Hornby, *Canadian Direct Marketing Association and Direct Sellers Association*, in D. Cohen and K. Webb, eds., ***Exploring Voluntary Codes in the Marketplace*** (Ottawa: Government of Canada, publication forthcoming).

[33] For example, some real estate boards refuse access to Multiple Listing Services where a member is in non-compliance.

[34] McChesney, 16.

[35] Note that CBA cannot banish member banks. Bennett, 26-27. The CDMA uses banishment as a sanction. Hornby, 10. The CCPA requires adherence to the Responsible Care program as a condition of membership. Bregha and Moffet, 20.

[36] Consideration has been defined by the courts as, "some right, interest, profit or benefit accruing to the one party or some forbearance, detriment, loss or responsibility, given ,suffered or undertaken by the other." *Currie v. Misa* (1875) L.R. 10 Exch. 153. Generally this takes the form of a payment for goods received or services rendered.

[37] For more information on contract law in general please see: G.H.L. Fridman, The Law of Contract in Canada (Scarborough: Thomson, 1994).

affiliation with the association, and gain access to services provided by the association. A failure of a member firm to abide by agreed-upon standards set by the association is actionable in contract by the association, just as a failure on the part of the association to provide agreed upon services could result in an action against the association.

A recent Canadian case concerning an industry association and an individual member was the 1991 Nova Scotia decision *Ripley v. Investment Dealers Association.*[38] In this case a member of the Association had breached its standards and was subsequently disciplined by its Business Conduct Committee. Although Ripley acknowledged that he was familiar with the standards set by the organization and the penalties for breaching them, he argued that the association should not be permitted to discipline him since this would violate his *Charter* rights under s. 7 and 11. The Nova Scotia Court of Appeal ruled against Ripley noting that:

> It may be inferred that members of the securities industry contract to regulate themselves because it is to their advantage to do so. An obvious benefit is the avoidance of the need for government regulation in a field where the need for protection of the public might otherwise attract it. A party to such a contract cannot have it both ways; if he enjoys benefits from a contract which excludes government intervention from his profession, he cannot claim *Charter* protection when he is accused of breaching the conditions of his contract.[39]

The effect of the decision is to uphold the right of industry associations to enforce agreed upon standards on members. In its result, actions of this sort by associations against members resemble enforcement actions of regulatory agencies against regulated parties. The key difference is that, in a voluntary code situation, an industry association can bring a contract-based enforcement action only against a party who has previously agreed to the arrangement. Those firms or individuals who choose not to join the association are legally untouchable by that association through contract litigation, even though the reputation of all the firms in a particular sector may be sullied by the activities of the non-participating firm.[40]

*Firms and Suppliers*

Firms can require that suppliers meet certain criteria as a term of contract. This is the approach used by The Gap with respect to the labour practices of their Latin American suppliers. An interesting innovation is the recent commitment by The Gap that compliance will be reviewed by third party monitors.[41]

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[38] Ripley v. Investment Dealers Association (Business Conduct Committee) [1991] 108 N.S.R. (2d) 38 (N.S.C.A.)

[39] *Ibid*.

[40] It is worth noting that although compliance with voluntary arrangements cannot be compelled through a contractual action, other legal pressures, particularly tort law, can lead a non-member to comply. This is discussed in detail later in this paper.

[41] Rhone, *The Gap*, 8.

*Consumers and Retail Firms*

From the standpoint of consumers, a voluntary code is a commitment made by a firm or group of firms that, should certain conditions be fulfilled by the consumer, then the consumer will be entitled to certain results. It has long been established in contract law that an offer made to any member of the public, if accepted, must be honoured.[42] If the terms of the offer are not met, a consumer can bring an action in contract, and in the event he or she was successful would be entitled to damages.[43] Thus, for example, if a company claimed that it adhered to a voluntary code concerning protection of the personal information of consumers, and then did not protect the information according to the terms of the code, it would be liable in contract, and the consumer would be entitled to restitution. It is perhaps self-evident that enforceability of any contract depends on the terms of that contract being sufficiently precise. Thus, for example, a statement that a product is made "in an environmentally friendly way" might not be sufficiently precise to be legally enforceable.

If a retailer falsely claimed that a product or service had certain attributes, and the retailer knew that the representation was false, and intended to deceive -- for example, that it was a CSA certified product or service, when it was not -- a consumer may bring a contract-based action for fraudulent misrepresentation.[44]

*Consumers and Manufacturers*

In most cases consumers do not purchase goods directly from the manufacturer, but instead buy them from a vendor. In this scenario a contract exists between the consumer and the vendor, but no contract exists between the consumer and the manufacturer. However, this does not prevent the consumer from suing the manufacturer for breach of contract. Using a doctrine known as "collateral contracts," the court can find that an implied contract exists between the manufacturer and the consumer where the manufacturers make claims concerning their products or services which cannot be fulfilled. Thus, for example, a manufacturer could claim that a product meets environmental standards which it does not. Where the court finds that a manufacturer's statements about a product constitute a binding promise or contractual undertaking the court will rule that a "collateral contract" exists between the manufacturer and the consumer and provide a remedy for any breach.

A case which illustrates the application of this principle is *Murray v. Sperry Rand Corporation*.[45] The manufacturer of farm machinery published a brochure which contained

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[42] *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 Q.B. 256 (C.A.)

[43] Fridman, 694.

[44] Fridman, 295.

[45] *Murray v. Sperry Rand Corporation* (1979) 23 O.R. 456 (Ont. H.C.)

statements about the quality of the machine. The brochure was highly promotional and was not merely a description of the machine. The court found that anyone reading the brochure would reasonably conclude that the manufacturer was promising that the described performance was the actual performance of the machine. Even though the product was purchased through a distributor the manufacturer was found liable to the consumer in contract since through its promises it had induced the consumer to purchase the machine.

It is possible for consumers to bring actions in contract against both manufacturers and retailers, and indeed there may be circumstances when either or both may be involved in voluntary code arrangements which attract contractual liability.

*Communities and Firms*

It is conceivable that a community, or a non-governmental organization acting as a surrogate for a community, could enter into a contractual arrangement with a firm regarding that firm's compliance to a set of commitments. For example, in the GAP clothing labour code situation, a leading labour or consumer non-governmental organization could form a contract with the GAP in which the GAP would agree to pay certain agreed upon damages if cases of non-compliance are discovered.

*Drawbacks of Contract-Based Actions*

There are a number of factors which tend to mitigate against individual consumers bringing actions in contract against retailers or manufacturers for violations of the terms of voluntary codes. Most focus on the uneven power relationship between the two parties: firms tend to have the expertise to know when a contractual term is being violated, whereas individual consumers may not. Firms may also have the know-how to successfully fight a contract action in court, while individual consumers may be intimidated by court processes, and not knowledgeable about court rules and procedures. Firms are more likely to have the resources to hire lawyers than individual consumers, and their representatives. Terms of contracts must be sufficiently precise to be enforceable. And finally, the individual damage to any one consumer may be sufficiently small that the consumer may simply decide not to bother with the action. With respect to this latter point, this may be particularly troubling since, while the damage to any one consumer may be inconcequential, the cumulative or aggregate damage to all affected consumers and to the marketplace may be quite serious.

It is for all these types of reasons that consumer regulatory agencies have been created. They can act on behalf of individual consumers, and they have the expertise, time and resources to see such actions through to fruition. But with respect to contract-based violations of voluntary codes, another possible route is class actions.[46] Here, one or a small group of consumers can

[46] For more information regarding class actions see Michael Cochrane, Class Actions in Ontario: A Guide to the Class Proceedings Act 1992 (Toronto: Canada Law Book, 1992).

bring an action on behalf of all affected consumers. In those Canadian jurisdictions which have modern class action legislation (eg. Ontario, British Columbia and Quebec), there are a number of procedures and mechanisms in place which level the playing field between the parties, and increase the likelihood that mass contract-based breaches can be remedied.

**Voluntary Codes and the Law of Negligence**

Although the consent-based nature of many voluntary code arrangements makes contractual actions a particularly self-evident mode of recourse, actions based in the tort of negligence may also be possible in certain circumstances. A key feature of such actions is that they may impose liability on parties even if those parties never directly participated in a voluntary code arrangement. In this way, it is possible for voluntary code arrangements to reach beyond their contractual foundations to apply to "free riders." Affected communities who are in a non-contractual relationship may also be able to make use of voluntary codes in negligence actions. For example, if citizens of a town downwind from a polluter suffer certain harm, it is possible that they can bring an action in negligence, and make use of the existence of a voluntary code concerning emissions as evidence of an accepted industry standard, even though those citizens may have never entered into any type of formal arrangement with the polluter.

To establish a cause of action in negligence the aggrieved party must show the presence of three factors: the existence of a duty of care owed by the defendant to the plaintiff, a breach of the duty caused by the defendant failing to meet an acceptable standard of care, and actual harm ensuing from the breach.[47]

*Standard of Care*

In general the standard of care is "that degree of care which a reasonably prudent person should exercise in same or similar circumstances."[48] However, where negligence occurs in the course of a specific function the standard of care changes. For example, where a doctor is accused of medical negligence the standard becomes that of the reasonable doctor in like circumstances. When allegations of negligence are made against a corporation the standard generally used is that of the particular industry.

For example, if a chemical company were accused of negligence, their conduct would be judged against the industry practice. If the company's conduct deviated from the industry practice there would be a strong presumption of negligence. Although the industry standard is not determinative of negligence, proof of deviation from the industry standard may be a difficult burden for a defendant to overcome.[49]

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[47] Allen M. Linden, Canadian Tort Law (Toronto: Butterworth's, 1988) 92.

[48] Joseph R. Nolan and Jacqueline M. Nolan Haley, Black's Law Dictionary (St. Paul: West, 1990) 1404.

[49] *Clark v. MacLennan* [1983] 1 All E.R. 416 (Q.B.)

Oftentimes, courts find the accepted industry practice indicative of what is reasonable in the circumstances. Furthermore, it has been suggested that it would be unfair to demand that the defendant in a negligence action be required to know of safeguards beyond those used in their profession.[50]

For the above reasons negligence actions often turn on the industry standard. Thus, if voluntary codes have the effect of establishing, documenting, and/or raising the standard for a particular industry it is likely that the courts will apply this standard and the industry members will be judged more harshly than at present. In addition, those who are not adherents to a voluntary code will likely be judged by the standard specified in the code since it is the accepted industry norm. This could have a beneficial effect on firms which have refused to directly participate in voluntary code arrangements (eg. free riders). American judge A. David Mazzone sees the deterence of free-riders through increased potential liability as one of the main benefits of voluntary standards. Speaking about the ISO 14001 environmental standards, Mazzone commented, "This (reduced chance of liability) is the carrot. If companies fail to adopt a compliance programme and commit an environmental offence, we will essentially be giving them the stick."[51]

However, the use of voluntary codes as a measure of standard of care in effect makes voluntary codes compulsory since it penalizes those who decide not to adhere to a particular standard by holding them to that exact standard. While this can have a beneficial effect if the result is increased safety, other potential effects could include reduced efficiency and anti-competitive practices. For example, a voluntary standard could be set at a level which is costly to meet and which offers few health and safety benefits. Nonetheless, companies could feel obliged to comply with these standards since they may be used by the court as the basis for determining the industry practice. In addition, standards set very high could be expensive to meet, forcing smaller companies out of the marketplace, and establishing a barrier to entry. By the same token, a voluntary code standard could be set at an artificially low level, below the standard that the industry is capable of achieving.

There are a number of examples of actions in negligence which turned on whether a voluntary standard was followed. For example, in *Visp Construction v. Scepter Manufacturing Co.*[52] a pipe manufactured to meet CSA standards burst. The plaintiff sued the defendant manufacturer arguing that the pipe was defective in its construction. The court ruled that the defendant had exercised due diligence in ensuring that the pipe was properly produced. Anderson J. emphasized the merits of adhering to the CSA code stating, "I find and conclude that the CSA specification was a reasonable standard for the defendant to have adopted, and that (the

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[50] Linden, 162.

[51] "Reducing Legal Liability With an ISO 14001 EMS," Standards New Zealand Environmental Newsletter Feb. 1996: 1.

[52] *Visp Construction v. Scepter Manufacturing Co.* [1991] O.J. No. 356 (Ont. C.J.-- General Div.)

defendant) took reasonable steps to ensure that its product met that standard."[53]

Another case in which a manufacturer demonstrated due diligence through its adherence to a voluntary standard was *Meisel v. Tolko Industries Ltd.*[54] In this case a construction worker who fell through a roof constructed with wood supplied by the defendant sued the defendant for the injuries he sustained. The plaintiff attempted to use the voluntary standard for lumber companies to his advantage, arguing that the wood was improperly graded according to the National Lumber Grades Authority (NLGA) standard. The defendant disagreed and used expert testimony to demonstrate that the NLGA standards were followed in a manner common in the industry. Since the defendant followed both the industry practice and the NLGA standards in assessing the wood the court concluded that they had exercised due diligence.

Just as evidence that one has followed voluntary standards can be used by a defendant to show that he/she has exercised due diligence, failure to adhere to commonly accepted standards such as CSA or ISO standards can be used by a plaintiff as evidence of negligence. For example in *Reed v. McDermid St. Lawrence Ltd.*[55] the plaintiff, an investor, sued her broker, arguing that he was negligent in failing to warn her of the volatility of her investment. At trial the court found for the plaintiff, emphasizing that, "The root of the basic ethic of the Investment Dealers Association (is) that a broker know his client. In this case, the form is evidence that the broker did not know his client. Among other things, the assessment to be made by the broker of the plaintiff's 'investment knowledge' was left blank."[56] This judgement was reversed on appeal, where the court ruled that the basic duty of the broker is to carry out the instructions of their client. Nonetheless, the decision is important because it demonstrates the potential value of voluntary codes to consumers.

While adherence or non-adherence to voluntary standards provides vital evidence in negligence cases, it is not determinative of the result. The judicial approach to voluntary codes is that they are useful to determine industry practices and to provide a comparison between a practice known to be safe and the practice used in a particular case. The approach of the Australian judiciary summed up by Duggan J., "Care must be taken not to attach too much importance to standards in cases such as the present. Failure to follow a standard does not, without more, establish negligence."[57] In the *Benton v. Tea Tree Plaza* case the plaintiff had fallen over a curb that was 50mm higher than the Australian Standards Association (ASA) standard. The court used the standard as a yardstick to compare the curb in question with a curb height it presumed safe. Had the curb in this case exceeded the ASA standard by only a few

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[53] *Ibid*, at 29-30.

[54] *Meisel v. Tolko Industries Ltd.* [1991] B.C.J. No. 105 (BCSC)

[55] *Reed v. McDermid St. Lawrence Ltd.* (1991) 52 B.C.L.R. (2d) 265 (BCCA)

[56] *Ibid*.

[57] *Benton v. Tea Tree Plaza* (1995) No. SCGRG 94/417, Judgement No. 5144 (SC of South Aus.) at 30.

milimetres the court may have reached a different result. The verdict was not based on the fact that the curb exceeded the height mandated by the ASA, but because it exceeded that height by a large amount.[58]

The presumption of the court that breaching a voluntary standard does not in itself prove negligence is not unique to Australia. In a recent British case the court ruled that a breach of the Professional Code of Solicitors is not ipso facto negligence.[59] The action of the plaintiffs, based largely on the lawyer's breach of the Code, was defeated.

Canadian courts approach voluntary codes in much the same way as their Australian and British counterparts. In *Murphy et al. v. Atlantic Speedy Propane Ltd.*[60] the defendant installed a gas dryer and propane tanks at the plaintiff's house. The dryer later started a fire destroying the house. The defendant argued that he had followed the industry norm described in the Code for Propane Burning Appliances and that the dryer met CSA standards. Despite the defendant's compliance with the voluntary codes followed by the industry the judge found the industry practice unsafe, ruling in favour of the plaintiffs and stating that the defendant "cannot hide behind the industry practice."[61]

A recent penal negligence case from New Zealand adds a new wrinkle to the way in which courts will use voluntary codes as evidence of due diligence. In *Department of Labour v. Waste Management N.Z. Limited*[62] the defendant company was defending a charge under the *Health and Safety in Employment Act* after an employee died while using a machine leased by the defendant. The case turned on whether the machine was unsafe. In their defence the company argued that their machine met the American standard for such machines. However, the judge ruled that meeting the American standard was insufficient since the American standard may have been inferior to the New Zealand standard as a result of the way in which it was developed, or the circumstances surrounding its development.[63] Although this case has not been applied in Canada, it does raise several interesting issues. For instance, should Canadian courts give preference to Canadian standards over American or international standards? Should the courts consider the development process of the particular standard? Should the courts consider the context (political and social) in which the standard was developed? These issues are discussed in the penal liability section later in this paper.

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[58] *Ibid*.

[59] *Johnson v. Bingley and Others* The Times, February 28 1995. (QB)

[60] *Murphy et al. v. Atlantic Speedy Propane Ltd.* (1979) 103 D.L.R. (3d) 545 (NSSC)

[61] *Ibid*, 555.

[62] *Department of Labour v. Waste Management N.Z. Limited* [1995] CRN No. 40040511262 (Dist. Ct.-- Auckland)

[63] *Ibid*, 9.

In summary, it is clear that voluntary codes are useful to the court both as examples of safe practices and as typical industry practices. While they are important factors in any negligence action, they are not determinative of the outcome. The increasing prevalence of voluntary codes might have the effect of ratcheting up the standard of care for a particular industry. This can occur in two ways. First, if the voluntary standard is adopted by a significant portion of the industry it will be taken to be the industry standard by the courts. Those who ignore the standard will have difficulty in defending a negligence suit. Since in many instances a large court award is more costly than meeting the voluntary standard, many companies will comply with the standard. Second, a voluntary standard which is not adopted by the industry will still provide a comparison for the court. Courts will often presume, for example, that a voluntary standard is an example of a safe practice in a particular situation. Even where the industry practice is different, the court may hold out the voluntary standard in order to demonstrate that the company did not use all due diligence in ensuring that the public was safe. Since they risk liability if they do not adhere to the highest possible standards, some companies will conform to the higher standard even if they are satisfied that the current practice is safe.

*Liability of Non-Governmental Standards Development and Enforcement Bodies*

The second issue which arises in a consideration of negligence is whether bodies entrusted with develping codes and ensuring compliance with them could be held negligent if they fail to enforce the code or discipline the offender, or if the code itself is not adequate.

Unless shielded from liability by statute, enforcement bodies can be held to the same standard of care as everyone else and can be held liable if their negligence leads to injury. (Some bodies are protected by statute from negligence suits. For example, the Security Exchange Commissions of most provinces are protected unless they fail to act in good faith.[64])

A case which addresses some of these issues is *Brink Forest Products Ltd. v. Madrigga*.[65] *Brink* is a complex case in which the plaintiff entered into a contract with the defendant for the supply of wood. The plaintiff claimed to have received a different grade of wood than it had contracted for and sued the supplier and the Council of Forest Industries (COFI). The plaintiff sued COFI for breach of contract and negligence. The action in contract was derived from the fact that the plaintiff had contracted with COFI to ensured that the wood was graded properly, while the action in negligence stemmed from the allegation that the wood was not graded properly. The court found for the plaintiffs, awarding them damages in contract and tort. The significance of *Brink* is that it demonstrates the vulnerability of standards enforcement bodies if they fail to enforce their standards. Although not discussed in *Brink*, it seems that standards enforcement organizations must be prepared to show that they exercised due diligence in attempting to ensure that their standards were followed by members.

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[64] *Kresic v. Alberta* (1985) 37 Alta. L.R. (2d) 342 (Q.B.)

[65] *Brink Forest Products Ltd. v. Madrigga* [1989] B.C.J. No. 2371 (BCSC)

Voluntary associations can also be liable where the codes they develop are inadequate. In *King v. National Spa and Pool Institute Inc.*[66] the estate of a man who died after diving into a swimming pool sued the trade association which promulgated the standards relied on by the manufacturer and installer of the pool. The Supreme Court of Alabama found that the trade association owed a duty of care to the user of the pool since they were aware that manufacturers and installers relied on their standards.

*Negligence Class Actions*

As with legal actions in contract, there are significant obstacles detracting from the ability of individuals who are harmed by the negligent action of others, to bring legal actions and thus protect their rights. These obstacles often include time, resources, and expertise. As well, as with contract actions by consumers, any one individual may be harmed to such a comparatively small amount that they might feel that a legal action would not be worth the trouble. Yet, when all of these individual instances of harm are aggregated, there might be significant damage being perpetrated on a community or segment of the population. Again, where reformed class action is available, the use of class actions could be of considerable use in such negligence actions, since the legislation is designed to make it feasible for one harmed individual (or a small number of harmed individuals) to bring an action on behalf of all harmed individuals.[67]

**Voluntary Codes and Penal Liability**

The main type of offence used in federal and provincial regulatory legislation enforcement is called the strict liability regulatory offence.[68] With this type of offence, once the Crown has proven the facts of the offence beyond a reasonable doubt, the accused will be convicted unless he or she establishes on a balance of probabilities that every reasonable action was taken to avoid the commission of the offence.[69] This is often referred to as a "due diligence" defence.

A key issue in the due diligence defence is what constitutes "reasonable care." In this respect, the process of determining what is reasonable care in the circumstances, and whether reasonable care has been exercised, is not unlike the process of determining liability in a civil action of negligence. In fact, the strict liability offence has been referred to as an offence of negligence for this reason.

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[66] *National Spa and Pool Institute Inc.* 570 So. 2d 612 (Ala. 1990)

[67] See Cochrane, Class Actions in Ontario.

[68] Kernaghan Webb, "Regulatory Offences, the Mental Element, and the Charter: Rough Road Ahead," (1989) 21 Ottawa Law Review 419 - 478.

[69] For example, in an environmental context, the facts to be proved might be that emissions emanating from the accused`s factory caused harm to the environment. In a consumer setting, the Crown might have to prove that a representation concerning a product or service was made, that it was misleading, that it was made by the accused, and that there was ensuing harm to consumers.

As with negligence actions, courts look to evidence of industry standards when considering due diligence defences. The existence of a voluntary code or standard, prepared and applied by industry, can be of considerable assistance in the court`s determinations of reasonable care.

In *R. v. Domtar*[70] the defendant was charged with a violation of the *Ontario Health and Safety Act* after a Hudson's Bay employee was killed while using a compactor leased by the accused to the Hudson's Bay Co.. The compactor lacked a safety mechanism which would have prevented the death of the Bay employee. The mechanism was also required by the ANSI standard (ANSI is an American standards association).[71] McNish J.P. concluded that non-compliance with the ANSI standard constituted evidence of a lack of due diligence on the part of Domtar. However, Domtar was ultimately acquitted because the nature of the accident was unforseeable and stemmed from factors other than the unsafe machine. Nevertheless, the prosecution's use of the ANSI standard in this case illustrates the manner in which standards could be used to prosecute those that by failing to adhere to them cause unsafe situations.

A remarkably similar New Zealand case provides a new wrinkle to the discussion of penal liability. In *Department of Labour v. Waste Management N.Z. Limited*[72] the accused was charged under the *Health and Safety in Employment Act* after one of their garbage compactor machines crushed the user of the machine. In contrast to the *Domtar* case the compactor in this case complied with an American standard. However, the court ruled that meeting the American standard was insufficient since it may have been less stringent than the New Zealand standard. In his decision O'Donovan J. noted that:

> It seems to me that political and other factors may very well determine the nature of a standard...A standard formulated in the United States against the background of legislation in that country might very well be different from one which needs to be formulated in this country having regard to our legislation...I am not satisfied in this case that adherence to the American standard on the part of this defendant serves to discharge the defendant's obligations under the New Zealand statute.[73]

Although this case has not as yet been applied in Canada it does raise some interesting issues for Canadian courts. Where several standards exist should the court give more weight to a Canadian standard over that of ANSI or ASTM? Perhaps more importantly, it suggests that courts might begin to look more carefully at how standards were made, and by whom. For example, in the development of the standard, were Canadian consumer, environmental, or other affected groups able to participate on an even footing with those of industry? Who made the final decision, and

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[70] *R. v. Domtar* [1993] O.J. No.3415 (Ont. C.J.-- Gen. Div.)

[71] The American National Standards Institute is a central body responsible for the identification of a single, consistent set of voluntary standards. In this case ANSI had endorsed safety standards for the particular type of compactor.

[72] *Department of Labour v. Waste Management N.Z. Limited* [1995] CRN No. 40040511262 (Dist. Ct.-- Auckland)

[73] *Ibid*, 9.

how?[74] As a final point, if government has participated in the development of a voluntary code standard, this is likely to assist an accused in successfully raising a due diligence defence, since this would be evidence that the standard adhered to by the accused was one which was in some way consented to or approved by government.

The existence of voluntary codes may also attract penal liability under federal or provincial trade practices law where representations are made that a particular product or service meets a particular standard and it does not.[75] One example from Australia is *Re: Robert George Quinn and Brian Alexander Given*[76] where a company falsely represented that their fire extinguishers met Australians standards. Other examples from Australia include: *Re: Evaline Jill Hamlyn and Moppet Grange Pty. Ltd.*[77] where the manufacturer of children's night garments incorrectly represented that the garments met Australian flammability requirements and *Re: Malcolm David Lennox and Megray Pty. Ltd.*[78] where the manufacturer affixed ASA standards labels to bicycle helmets which were not yet ASA approved.

**Voluntary Codes, Negligence and Crown Liability**

In a series of recent cases, the government has been held liable in situations of mal- or non-enforcement of legislation. If government officials participate in the development of voluntary codes, or otherwise endorse voluntary code regimes once in operation, they could be held liable if an individual or individuals, or an organization, is subsequently injured. When the Crown is sued, the court makes a distinction between two types of governmental decisions; policy decisions and operational decisions. As Cory J. explained in *Just v. British Columbia*:

> True policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors. However, the implementation of those decisions may well be subject to claims in tort.[79]

The doctrine from *Just* was applied in *Swanson and Peever v. Canada*.[80] In this case a plane

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[74] For example, the North American bicycle helmet industry uses four major standards which vary in the manner in which they are developed and how stringent they are. John Buchanan, Andrew Morrison and Kernaghan Webb, *Bicycle Helmet Standards and Hockey Helmet Regulations: Two Approaches to Safety Protection*, Office of Consumer Affairs.

[75] *Competition Act*, R.S.C. 1985, c. C-34, s. 52. *Ontario Business Practices Act*, R.S.O. 1990, c. B. 18, s.2.

*Re: Robert George Quinn and Brian Alexander Given* (1980) 41 F.L.R. 416

*Re: Evaline Jill Hamlyn and Moppet Grange Pty. Ltd.* (1984) Nos. G375-377 of 1983. (Fed. Ct. of Aus.)

*Re: Malcolm David Lennox and Megray Pty. Ltd.* (1985) Nos. VG23 to VG28 of 1985. (Fed. Ct. of Aus.)

[79] *Just v. British Columbia* [1990] 1 W.W.R. 385 (S.C.C.) at 403.

[80] *Swanson and Peever v. Canada* (1991) 124 N.R.218.

owned by Wapiti Aviation crashed, killing a number of passengers. Because Wapiti Aviation became insolvent, an action was launched against the federal government since Transport Canada was aware of Wapiti's repeated safety violations and failed to take action to prevent an accident. The court ruled that Transport Canada's decision not to take action against Wapiti was not a policy decision, but one of operation since the decision was not based on political, social or budgetary factors.

Where the court finds that the governmental action which is the subject of the lawsuit is an operational decision, the plaintiff must still establish that the Crown owed a duty of care to the injured party, that the Crown breached the duty of care, and that actual harm ensued. These remain significant hurdles to overcome before the Crown will be held liable in a voluntary code context.

**Voluntary Codes and the Law of Nuisance**

Linden, a leading tort law commentator describes nuisance as, " an unreasonable interference with the reasonable use and enjoyment of land by its occupier or of the use and enjoyment of a public right to use and enjoy public rights of way."[81] The basic premise underlying the tort of nuisance is that people should be free to use their own land in any manner they wish, so long as their actions do not interfere with the proper use of their neighbour's land. In recent years suits in nuisance have tended to be environmental in nature, addressing nuisances such as noise, vibration and pollution.

Voluntary standards can assist courts in determining what constitutes a nuisance. For example, in *340909 Ontario Ltd. v. Huron Steel Products Ltd.*[82] I.S.O. standards were used to determine whether vibrations caused by a plant constituted a nuisance. The defendant owned a plant which had two 800 pound steel presses. The operation of these presses created vibrations which made living near the plant unbearable. The owner of an apartment building adjacent to the plant launched an action in nuisance alleging that the operation of the presses interfered with his reasonable enjoyment and use of the land. Expert witnesses testified that at the time there were three different I.S.O. standards for vibration levels. The vibrations caused by the plant exceeded these levels by two, two and a half and seven times. The court found that the vibration levels were so severe that they interfered with the plaintiff's reasonable use and enjoyment of the land, and thus awarded judgement for the plaintiff.[83]

**Procedural Fairness, Natural Justice, the Charter and Voluntary Codes**

Public bodies with the power to decide any matter affecting the rights, interests, property,

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[81] Allen M. Linden, Canadian Tort Law (Toronto: Butterworths, 1993) 503.

*340909 Ontario Ltd. v. Huron Steel Products Ltd*. [1992] 9 O.R. (3d) 305n (Ont. C.A.)

[83] Ibid.

privileges, or liberty of any person must meet certain procedural obligations.[84] In addition, public bodies are subject to the obligations set out in the Canadian *Charter of Rights and Freedoms*, such as the section 7 right not to be deprived of life, liberty or security of the persons except in accordance to principles of fundamental justice. With respect to voluntary codes regimes, the nature and scope of the procedural obligations attaching to the development or implementation of voluntary codes is at this stage unclear, but would appear at this time to be limited.

There are two important and difficult thresholds that need to be overcome before public law concerns with procedural fairness, natural justice, and *Charter* obligations would normally be considered to apply. The first requires a determination of whether a "public body" is involved. When a voluntary code is developed by or for government, the case can probably be made that a public body is involved. However, where an industry association, or group of professionals initiates and develops a code, it is more difficult to characterize such bodies as public in nature. The decision of *Ripley v. Investment Dealers Association (Business Conduct Committee)*, discussed earlier, concerning the refusal to apply the Charter to a disciplinary action of a privately organized investment organization, is indicative of judicial attitudes on such matters.

It is interesting to note that in certain circumstances, U.K. courts have ruled that seemingly private organizations, with no statutory basis, can be subject to public law rules of procedural fairness. The most notable example of this is the case of *R. v. Panel on Takeovers and Mergers*, op cit., discussed earlier, where the court found that because of the public-oriented function performed by the body, its long historical close relation with government, and the fact that the body was referred to in legislation, the Takeover Panel was subject to public law procedural obligations. The case of *McInnes v. Onslow Fane,* [85] also discussed earlier, is another example of a U.K. court taking special notice of the public character of private self-regulatory bodies. It is difficult to predict whether Canadian courts will, in the right set of circumstances, follow the U.K. lead.

One issue in this regard is whether Canadian courts would consider the possible reduction in scope of *Charter* rights as we move from statutory to voluntary rulemaking and rule implementation.

If this first threshold is overcome, the second threshold would then need to be addressed. It concerns the question of whether an individual's rights, interests, property, privileges, security or liberty have been affected. Two possible scenarios where these might arise are first between an industry association and individual member firms in a disciplinary capacity, and second, between the code adminstrators or firms and members of the affected public. With respect to the former, the *Ripley* case is indicative of Canadian judicial reluctance to characterize private self-regulatory bodies as being subject to Charter protections. Concerning actions by affected

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[84] *Martineau and Butters v. Matsqui Institution Disciplinary Board* [1978] 1 SCR 118

[85] *op. cit.*

members of the public against industry associations, government bodies who were involved, or individual firms, one could envisage situations where citizens might be harmed by action or inaction in a voluntary code context, but these would undoubtedly be rare, and extraordinary.

At this point, then, the likelihood of public law concerns with procedural fairness, natural justice, or Charter responsibilities applying to voluntary code contexts are slim. However, the decisions of the U.K. courts discussed above indicate that they are not out of the question, and so voluntary code participants would be well advised to meet procedural obligations of notice and comment, for example, in the development and implementation of their regimes.

**Voluntary Codes and Competition Law**

Adam Smith wrote that when competitors get together the conversation often ends in a conspiracy against the public.[86] Since many voluntary codes involve competitors coming together to make standards and rules and impose these on themselves, it is no wonder that many such arrangements arouse suspicions. There is little doubt that voluntary codes have the potential to injure businesses which do not subscribe to them. Businesses which do not join a dominant industry association and adhere to its rules may suffer economically by being denied access to essential facilities, and otherwise excluded from an activity or industry.[87] This type of injury can adversely affect consumers since it may reduce competition in a particular industry and prevent new businesses from entering the industry.

There are a number of cases in which courts have held that businesses used voluntary code arrangements with the intent of hurting the business of rivals. In *Hydrolevel Corp. v. American Society of Mechanical Engineers*[88] (ASME) the jury found that the individual defendants -- important members of ASME, a standards setting body -- had acted to protect their companies from the competition of their rivals by suggesting in the name of ASME that their competitors' products were unsafe when in fact they were safe.[89]

However, voluntary codes -- like technical standards -- also have the potential to increase efficiency, for example, by providing the consumer with easy access to information through, for example, grading and ranking processes. Logos, which are often part of a voluntary scheme, can provide the consumer with an easy method to determine which sellers and products do or do not conform to a particular standard, allowing the consumer to reward the manufacturers of quality products. Another potential benefit of voluntary codes is that they can more readily allow new, small companies to compete with large, established companies. For example, the grading of

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[86] Adam Smith, The Wealth of Nations [1776] Vol. 1, Bk. 1, Ch. 10, Pt. 2.

[87] Robert Heidt, "Populist and Economic v. Feudal: Approaches to Industry Self-Regulation in the United States and England," McGill Law Journal 34:1 (1989): 41.

[88] *Hydrolevel Corp. v. American Society of Mechanical Engineers* 635 F. 2d 118 (2d Cir. 1980)

[89] See also: *Structural Laminates v. Douglas Fir Plywood Association* 261 F. Supp. 154 (D. Or. 1966)

products minimizes the advantage of past advertising and reputation.

In Canada it is a crime to, "conspire, combine, agree or arrange to restrain or injure competition unduly."[90] Nonetheless, the *Competition Act* provides a defence for those whose arrangement relates to the exchange of statistics, the definition of product standards, the definition of terminology used in an industry, protection of the environment, or the standardization of containers used by an industry.[91] However, this defence does not apply where the arrangement results in a reduction of competition in respect of prices, quantity or quality of production, markets or customers, or if the alliance prevents or deters anyone from entering or expanding a business.[92] According to the Director of the Competition Bureau, the defence will fail not only when the agreement is explicitly directed at reducing competition, but also when the indirect effect is substantially reduced competition.[93]

So far, the courts have not considered a case in which the defences and exceptions contained in 45(3) and 45(4) were used.[94] However, in a published Competition Bureau paper on strategic alliances, an example is provided which is illustrative of the way the Bureau views voluntary codes. In the example, the four largest manufacturers in an industry which is under pressure to be more environmentally responsible create an alliance to develop new technology for reducing emissions. In this example the alliance falls within one of the 45(3) defences, namely protecting the environment.[95] Thus, the Director will only initiate an inquiry if an exception to the defence applies. For example, if the environmental goal of the alliance required a reduction of final product outputs rather than of emissions, an inquiry may result.[96] The example provided by the Bureau also notes that there is less chance of anti-competitive behaviour where all of the interested parties are involved in the development process.[97] In light of the uncertainty concerning what constitutes acceptable and unacceptable voluntary code activity, from a competition law perspective, the Competition Bureau invites firms contemplating entering into a voluntary code-type of arrangement to take advantage of the Bureau`s advisory opinion services.[98] Although the opinion would not have the force of law, and is merely an indication by the Director as to whether a proposal is likely to attract liability under the Act, the opinion will

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[90] *Competition Act*, R.S.C. 1985 c. C-34. s. 45(1)(d)

[91] *Ibid*, s. 45(3)

[92] *Ibid*, s. 45(4)

[93] Director of Investigation and Research, Strategic Alliances Under the Competition Act (Hull: Ministry of Supply and Services, 1995) 8.

[94] *Ibid*, 8.

[95] *Competition Act*, s. 45(3)(i)

[96] Strategic Alliances, 18.

[97] *Ibid*, 18.

[98] Strategic Alliances, 14.

provide a basis for assessing the risk of prosecution under the Act, as well as providing the foundation for a due diligence or officially induced error defence.

Canadian courts have in some cases found the actions of industry associations to be problematic, and in others, have upheld them. In *R. v. Electrical Contractors Association of Ontario*[99] a voluntary association of electricians was found to have unduly lessened competition through restricting membership in the organization. However, successful actions against self-regulatory associations are rare in Canada, an indication that the courts view them with favour. The case of *R. v. British Columbia Fruit Growers Association et al*[100] illustrates the amount of leeway Canadian courts will give to self-regulatory bodies. In this case the BCFGA, which was composed of many of the members of the industry, adopted a rule which prevented storage facilities from offering their services to non-members. This effectively limited independent fruit growers to selling their products fresh. The court acquitted the BCFGA noting that non-members could still sell their fruit.

Because any sort of cooperation between competitors is viewed with suspicion it would be wise for associations which are attempting to establish voluntary codes to solicit the participation of outside interests from the very beginning. Voluntary codes which are developed through a transparent process and the involvement of outside interest groups are much less likely to trigger suspicions of collusion for two reasons: first, the participation of outside groups representing consumer interests is anti-thetical to collusion, and second, because input from outside groups would likely compel the development body to address competition concerns during the development process. In addition, it would be wise to consult with representatives from the Competition Bureau early in the process, in addition to soliciting an advisory opinion from the Bureau.

**Voluntary Codes and Government Recognition**

The Ontario Ministry of Consumer and Corporate Relations (MCCR) is currently developing self-management initiatives designed to allow particular industry sectors to assume greater responsibility over their activities. The largest component of the self-management project pertains to a legislatively sanctioned self-regulatory process, which would see government acting as watchdogs over industry associations which would have the primary role in disciplining the activities of its members: this industry role would be recognized in law.[101]

A smaller, secondary component of the self-management initiative which MCCR is considering would involve the Ministry endorsing industry associations which have in place rule structures which meet certain identified criteria. The endorsement would be an indication of the

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[99] *R. v. Electrical Contractors Association of Ontario and Dent* [1961] O.R. 265

[100] *R. v. British Columbia Fruit Growers Association et al* (1986) 11 C.P.R. (3d) 183

[101] *Approaches to Industry Self-Management*. Bill No. XX.

association`s reliability and would serve to increase the strength of the association by making it attractive to new members. MCCR`s involvement would be limited to endorsement and liaison, and would not extend to funding, providing legal advice or intervening in specific association matters. There is the potential for liability in this arrangement, although the exact extent is difficult to predict at this point.

Quebec consumer legislation also contains provisions which authorize the Quebec consumer office to codify all or part of a voluntary code, in order to motivate compliance across an entire industry.[102] According to an official from the Office de la protection du consommateur, this power has been used only once, to convert voluntary codes pertaining to pre-paid funerals into laws.[103]

## Conclusion

Voluntary arrangements and regulatory regimes are two different approaches to rule systems, each with advantages and disadvantages. The main advantages of the regulatory approach include visibility, credibility, accountability, comprehensive application to all, greater potential for rigorous standards, cost-spreading, and availability of a wide range of sanctions. Key disadvantages of the regulatory approach include its high degree of formality, expense, jurisdiction based limits, limted flexibility, and difficulty of amendment.

Strengths of voluntary arrangements include high flexibility, lower costs, low formality, potentially greater ease of development and amendment, limited concerns with jurisdictional limits, and potential for greater internalization of responsibility and costs. Drawbacks include generally lower visibility, credibility, difficulty in applying to free riders, less likelihood of rigorous standards being developed, uncertain public accountability, and more limited array of sanctioning options.

The two rule systems can and do operate concurrently, and even in complementary ways. It is undoubtedly true that much of the effectiveness of voluntary initiatives stems from the fact that they operate “in the shadow of the law.” On the other hand, some might feel that time and energy spent on voluntary initiatives can be a delay tactic, decreasing the likelihood of effective regulations being developed. Even if voluntary initiatives do prove ineffective, they can nevertheless provide a useful point of departure for regulatory initiatives.

Voluntary code regimes frequently have legal implications. Since they are consent based systems, it is possible for associations to bring actions in contract against non-complying member firms, and consumers may be able to claim breach of contract where products and services do not

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[102] *Consumer Protection Act*, R.S.Q. c. P-40.1, s. 314.

[103] Telephone interview with Louis Curras, Office de la protection du consommateur, July 1996.

adhere to the rules and standards as represented to the consumer.

The existence of voluntary standards can be used in actions in negligence as evidence of industry standards. Similarly, in regulatory enforcement actions, the existence of standards can be relevant to due diligence defences. In both contexts, since multiple standards may exist, courts in the future may explore in greater depth how standards were made, by whom, and when. Where reformed class action legislation is in place, this will enhance the ability of affected parties (e.g., consumers, environmental groups, property owners, etc.) to bring class actions and thereby overcome the systemic disincentives to individual actions on matters where voluntary code standards are violated.

Firms who are sued in negligence, or prosecuted using strict liability offences may be able to use the existence of voluntary codes, and the participation or endorsement by government of voluntary codes, to establish due diligence and avoid liability. There is also potential for governments to be held liable in negligence based in part on participation in or endorsement of voluntary code arrangements. With respect to competition issues, the Competition Bureau offers an advisory opinion service which can assist firms which are considering voluntary code systems in determining whether their proposed systems potentially could raise an issue under the Competition Act.

Taken together, this paper suggests that in certain circumstances, voluntary codes may be useful adjuncts, supplements or alternatives to regulatory approaches. However, private sector actors contemplating a voluntary initiative, as well as participating government officials and NGOs should fully consider the legal implications of such arrangements before undertaking them. Generally, the more open, transparent, and accessible that the process of voluntary code development and implementation is, the greater the likelihood that the code regime will be credible and effective, and will withstand legal challenges. Early and meaningful consultation with, and involvement of, all affected parties, and subsequent meaningful involvement of these same parties in implementation, increases the potential that the legal pitfalls will be avoided.