

Seven Questions About Dealing with the New Government of Canada

by Sean Moore
Gowling Lafleur Henderson LLP

In my practice, I deal regularly with U.S. lawyers whose clients have requested help in dealing with the government of Canada. Of course, the questions these lawyers ask me vary considerably, according to the specifics of the issue at hand. But since the January 2006 federal general election that resulted in a new national government for Canada's 32 million people, there are some questions that usually come up regardless of the matter at issue.

What do American lawyers need to know about dealing with the new government of Canada?

The first thing they need to understand is that, since early in 2006, Canada has had the first real change in federal administration in more than 13 years. Prior to last January, Canada had had two successive Liberal administrations since 1993. While the Liberals went to great lengths to demonstrate that they had refreshed and rejuvenated both the party and the government through a leadership change—after a protracted, messy, internecine conflict—Canadian voters, when given the chance, opted narrowly for a change in management. The result: the election of a Conservative minority government, headed by 42-year-old economist Stephen Harper, who acquired the mantle of prime minister.

Okay, so define some of those terms for us, such as “minority Parliament” and “Conservative.”

Sure: First we'll deal with “minority government,” or “minority Parliament.”

Perhaps the best way to think about the current Canadian scene, from the perspective of an American, is to look at the new political landscape in Washington, where the party that forms the executive branch no longer has control of Congress—and all the complications associated with that.

In Canada, a minority government (or minority Parliament) means the party that wins the most seats in the House of Commons in a general election “forms the government” despite having a minority of seats in the House (i.e., the total seats held cumulatively by opposition parties outnumbers those on the government side of the House.). In the current 308-seat House of Commons, there are (as this is being written in mid-November) 124 Conservatives, 101 Liberals, 50 members of the separatist Bloc Quebecois and 29 New Democrats, with two vacancies to be filled through by-elections in December; thus the

governing Conservatives are more than 30 seats short of the 155 seats needed to form a majority government.

This also means that the government—the governing Conservative party—is outnumbered in all the legislative committees of Parliament. In House of Commons committees—which are supposed to generally reflect the partisan makeup of the Commons itself—the Conservatives are always at least one or two seats short of a controlling majority. In the other chamber of Parliament, the Senate, the Conservative Party has been in minority for many years.

The Liberals continue to enjoy a commanding majority in the “upper house” for a simple reason: The leader of their party has been *appointing* members of the Senate for the past 13 years.

The role, prestige and influence of the Canadian Senate should not be confused with those of its powerful American counterpart. As is the case in the U.S., all legislation, before it becomes law, needs to be approved by both chambers in the bicameral legislature. But it's here that the similarities end.

Members of the Canadian Senate are appointed—till age 75—by whomever is the prime minister of the day when a vacancy in the 105-seat chamber is created by either retirement or death of a sitting senator. Currently the standings are Liberals 64, Conservatives 23, with eight independents and ten—count 'em, ten!!—vacancies. (Prime Minister Harper, while in opposition, was highly critical of the then-governing Liberals' reluctance to have senators elected, so the new PM is committed to changing the system and is reluctant to use his constitutional authority to appoint new senators in the meantime—self-defeating as that might sound.)

Thus the Harper government is doubly in a minority situation. Another election—broadly expected in early to mid-2007—could change that, at least as far as its standing in the Commons. But Canadian politics is highly volatile these days, and there are probably even odds that a resurgent Liberal

Party could regain power, albeit, probably with no better than a minority government of their own.

The implications of such volatility—in terms of both form and substance of government and public policy—continue to be significant and should be kept in mind by any American lawyer who finds him- or herself dealing with the government of Canada.

Are Canadian Conservatives much like their conservative brethren in the U.S. Republican party?

The short answer is both yes and no.

Yes, on some issues they share many of the same value constructs as their American cousins. Though there are centrist elements in the party, for the most part, the Canadian Conservatives are predisposed against same-sex marriage and abortion and are more robustly “law and order” in their approach to crime and justice than all of the Canadian opposition parties are. While the current Conservative party has also moved to disband Canada’s long-gun registry, they still support other elements of Canadian gun control that go far beyond most anything that exists in the U.S.

And while the Conservatives are promoting a more flexible approach to the use of private-sector means of delivering certain health-care services, the party is a strong supporter of Canada’s publicly funded universal Medicare system and shows no interest in removing the price caps on prescription medicines—positions their conservative cousins in the States have hardly embraced.

The newly created Conservative Party of Canada is an amalgamation of the former center-right Progressive Conservative Party (“PCs”) and the further-right-of-center, more libertarian, Reform/Canadian Alliance parties. In reality, it was more of a takeover than a merger, and the net effect is that the Conservative Party of 2006 is several notches to the right of the Progressive Conservatives, who were often dubbed the “Red Tories.”

(On the often-unreliable spectrum of “left to right,” Liberals would be considered center left by North American standards, comfortably positioned to the left of what one might consider the left wing of the U.S. Democratic Party. As for the Canadian New Democrats and Bloc Quebecois, the only thing close to either of them in the U.S. is Vermont’s newly elected independent United States senator, Bernie Sanders.)

Can we assume that the election of the Harper Conservatives indicates a rightward turn in Canadian politics?

No, or at least probably no more so than the result of the November 7 midterm elections in the U.S. necessarily indicate

a major shift to the left in United States politics.

Last year’s defeat of the Canadian Liberal Party had less to do with policy differences among the parties or ideological preferences in the electorate. Rather, the Liberal Party imploded because of internal division and the public fallout (especially in Quebec) of a political scandal involving improper spending of federal money, ostensibly to combat the Quebec separatist movement.

On economic matters, the Conservatives certainly sound like Republicans with their tax-cut mantra. But, then again, it’s important to remember that the Canadian government has

been regularly racking up huge—by Canadian standards—budgetary surpluses for almost ten years. (In fact, the federal Department of Finance has recently been wondering out loud how and why it continues to underestimate the projected size of this year’s surplus; tax revenues have shot up and nobody’s quite sure why. Now *there’s* a problem every government on the planet would like to have!!)

The Conservatives have gone populist on at least one very big tax issue.

On October 31, they announced a hugely controversial move to close off the tax advantages enjoyed by corporate income trusts, saying corporations had to bear their fair share of the nation’s tax burden. Now the government says it wants to get tough with offshore “tax havens”—not exactly your typical conservative lines on taxes.

On regulatory matters, the new Conservative government has been strangely silent. Though many of Canada’s federal regulatory regimes are notoriously sluggish and process-ridden, the Harper administration has not included fixing them as among their priorities.

With the new Canadian government, is there a different view of the U.S. and its government?

Yes, a significant difference; in many respects, it’s a much more positive one than has been the case for several years. Though, in talking about this, one must note that when it comes to Canada-U.S. relations, there is a tendency, particularly in the Canadian media and partisan discourse, to emphasize (and often magnify) differences at the expense of observing the obvious: that these two countries share much more in common than they differ on. The scope and depth of cooperation and collaboration between working-level officials of the two governments is extensive and generally very positive. In those instances where it’s in someone’s perceived interests to underline differences, it’s usually some politicians who muck things up.

Having said that, it’s also important to caution that whatever enthusiasms the current Canadian government may have

Canadian politics is highly volatile these days, and there are probably even odds that a resurgent Liberal Party could regain power.

for their fellow-traveling conservatives in the U.S., overt expressions of common cause and purpose are generally muted. In much the same way that American politicians are wary of being seen as too influenced by foreign interests or points of view, likewise Canadian politicians—especially Conservatives—have to put a healthy distance between themselves and American influence.

On foreign policy, the Harper government has been decisive yet very careful. It has reaffirmed and extended Canada's commitment to having combat troops in Afghanistan, despite diminishing support for the position among the Canadian public. And it has been largely at one with the U.S. on Middle East policy. But, it's a delicate game for the Conservatives. Their future political success will rely greatly on how the party does in Quebec; that province is decidedly more pacifist than the rest of the country and much more hostile to the use of the Canadian military abroad in anything but peacekeeping.

Do you have any specific advice for American lawyers who need to get involved in Canadian politics and public-policy issues?

Yup, be more careful than ever about understanding and complying with the ever-evolving nature of Canadian ethics laws and regimes.

For example, be sure about what, if any, compliance requirements may exist with respect to lobbyists' registration. Such laws exist not only at the federal level but also in the provinces of Ontario, Quebec, Newfoundland/Labrador, Nova Scotia and British Columbia. While there are exemptions from lobbyists' registration in each of these jurisdictions for communications with public officials in respect of the interpretation, application or enforcement of *existing law or regulation*, there is no general exemption for foreign lawyers (or consultants) from having to register if they are otherwise undertaking activities that require registration.

Given the prominence that financial contributions to politicians or political parties play in U.S. politics and lobbying, it's vital that American lawyers understand that the rules in Canada are very different. Not only are there strict election-spending limits for parties and candidates in most jurisdictions, but, in some provinces, financial contributions by corporations and unions are either totally banned (in Manitoba and Quebec), and at the federal level, donations from corporations and unions are very restricted (currently, maximum \$1,000; cumulatively, to any one party; and soon to be banned entirely). Individual donors must be legally resident in Canada, and in Quebec, donors to provincial political parties must

be resident in the province. Ergo, no contributions from foreign lawyers or businesspeople, unless they live in the Great White North.

Does this new Canadian government “consult” the same way its predecessor did?

While Congress and its committees are the most visible focal point for federal government consultations in the U.S., it's the executive branch in Canada that has usually been the most active in consulting stakeholder groups on emerging policy.

Canadian governments have been, historically (for the last 25 years or so, at least,) famously into “consultations” on issues large and small. Sure, some of that is undertaken by legislative committees in the Commons and Senate, but what has distinguished Canadian governments has been the wide variety and extensive use of mechanisms for stakeholder and general-public consultations on all manner of issues, mainly by government departments and agencies. Lately, that's been changing.

The Harper government has been slimming down and expediting consultations processes. It has been getting away from multimember advisory groups, which used to include a variety of representational criteria (gender, region, linguistic group, etc.) and often had broad mandates, their own staff complement and extended reporting deadlines. No more.

These days—if at all—it's three-member advisory groups, short time frames, tightly focused terms of references and shared use of existing public-servant support. Emphasis now is on prompt decision making, clear deliverables and general avoidance of terms like “strategies,” “agendas” and “frameworks”—words that countless task forces and advisory panels have traded in over the years.

The Harper government is determined to appear action-oriented and to contrast its management style with that of the previous Liberal administration that the Conservatives dismissed as wallowing in analysis paralysis.

One “stakeholder” that's often relevant on some Canadian public-policy issues is the government of the United States. Consulting official Washington is a frequent step along the way in the development of certain policy options, but it's one that must be executed with great care and discretion. The optics of it are as tricky as its significance can be considerable—and that's another thing American lawyers should keep in mind. ■

Sean Moore is an Ottawa-based partner and public-policy adviser at the law firm Gowling Lafleur Henderson LLP.

The executive branch in Canada has usually been the most active in consulting stakeholder groups on emerging policy.



Sean Moore, *Gowling Lafleur Henderson LLP*

Tel: (613) 786-0216 • Fax: (613) 788-3504 • E-mail: sean.moore@gowlings.com

Sean Moore is an Ottawa-based Gowlings Partner who serves as the Firm's Public Policy and Public Affairs Advisor. He also serves as a Principal of Gowlings Consulting Inc.- Public Policy Consultants. Mr. Moore has a broad-based practice involving government relations, regulatory affairs, public-policy advocacy and public-policy development for clients in the public, private and non-governmental organization sectors in Canada and abroad. He has accumulated extensive experience working in both Canada and the United States on behalf of corporations, governments, industry and professional associations involving a broad range of issues. He is currently developing a suite of professional development training and education tools and materials related to public-policy advocacy.