



Here an act,
there an act,

everywhere uncertainty *by Patti Ryan*

There's something in the air, and it isn't love. It's climate change, smog and corporate confusion. After successive Liberal governments, the Conservatives have introduced the new Clean Air Act and now, corporate Canada is once again revisiting its approach to the environment.

Introduced by then Environment Minister Rona Ambrose in October, the Clean Air Act was immediately criticized by the opposition parties, who threatened a non-confidence vote. NDP leader Jack Layton met with Prime Minister Stephen Harper to broker a deal that saw the bill, which had undergone just one reading in Parliament, sent to an all-party special parliamentary committee for amendments.

"If you had to generalize, basically what the Clean Air Act did was set some loose targets over a long period of time, whereas Layton's proposal is to set fixed targets over a short period of time," explains Ron Ezekiel, a partner with the environmental, energy and resources practice group at Fasken Martineau DuMoulin in Vancouver. "They'll probably end up somewhere in the middle-but it's hard to say."

Hard to say is an apt description for the entire regulatory environment surrounding climate change-and it's making life difficult

for inside counsel at big firms in high-emissions industries.

World concern about greenhouse gases was sparked 15 years ago at the United Nations Framework Convention on Climate Change (UNFCCC) conference. The next step, five years later, was the 1997 Kyoto Protocol. Then, in 2002, the Chrétien government came out with its green plan, says Ezekiel. "But Martin kaihoshed that and came up with a different plan in 2005. Then, of course, he left office and Harper came in, and he and Rona Ambrose tossed that in the waste bin, and came up with the Clean Air Act in 2006."

All the stalling, stumbling, trashing and rehashing has left industry groping for guidance. "I think a lot of them are sort of standing there shaking their heads, thinking, 'We all see the climate change train coming down the tracks, but we don't know whether it's going to turn left, right or keep going down the middle,'" says Ezekiel.

Corporate counsel, especially in emissions-intensive industries, know what questions they ought to be asking, but answers are hard to come by because of the uncertainty. For example: What steps should your company be taking right now to manage risk and ensure the board of directors gets the advice it needs

PIERRE LOUIS MONGEAU

Annie Carpentier
Chief Counsel, Alcan Primary Metal Group

The rapid succession of governments in the past half-decade—from Chrétien to Martin to Harper has made it difficult for most corporations to anticipate what will be expected from them in response to climate change and other environmental concerns. In such an ambiguous regulatory environment, what should corporate counsel be doing to help companies prepare?

to align the firm with the new laws? What's at stake if your corporation falls behind in its preparations for compliance?

“Those questions are excellent when you've got clear policy,” says Ezekiel. “But we don't. Not only have the goalposts been moving for the last five years, now the goalposts under the new Clean Air Act are 50,000-foot goalposts. They don't say how the government is going to regulate industry; they just say government intends to regulate industry. But we knew that already.”

That leaves entire sectors, especially those with heavy emissions, trying to imagine all the different regulations that might issue from the Clean Air Act over the next few years. They are also working on their options for achieving compliance in any of those potential scenarios. “But there's not a lot of compliance work underway,” says Ezekiel. “There's nothing to comply with.”

For now, companies can focus on understanding their emissions and identifying where the costs of reducing emissions is lowest, he adds. “It's about getting their house in order around being able to track this information and developing options for management.”

That might involve educating the board of directors and senior management about the potential risks. Also, companies with large emissions inventories are well advised to participate in any



Ron Ezekiel
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consultation processes, so they can offer input and understand where the government is heading.

Going green creates opportunities

Gray Taylor, a partner with Bennett Jones in Toronto, points out that in the context of climate change, emissions may also offer opportunities. “Think not only of the bad things that can happen to your company, but also about the good things your company might be able to participate in. Because climate change regulations are going to create lots and lots of opportunities in areas that aren't regulated.”

But is there no value at all to being proactive about going green? After all, investors are increasingly aware of the potential for climate change to have a major impact on the profitability of companies in which they invest. Companies that take early action to curb emissions and green their operations will be at the front of the pack when regulations take effect. So isn't acting now good for business?

Not necessarily, say both Taylor and Ezekiel. “If you try to do something concrete, you may well be heading in the wrong direction and worse, you could be hurting yourself,” says Taylor.

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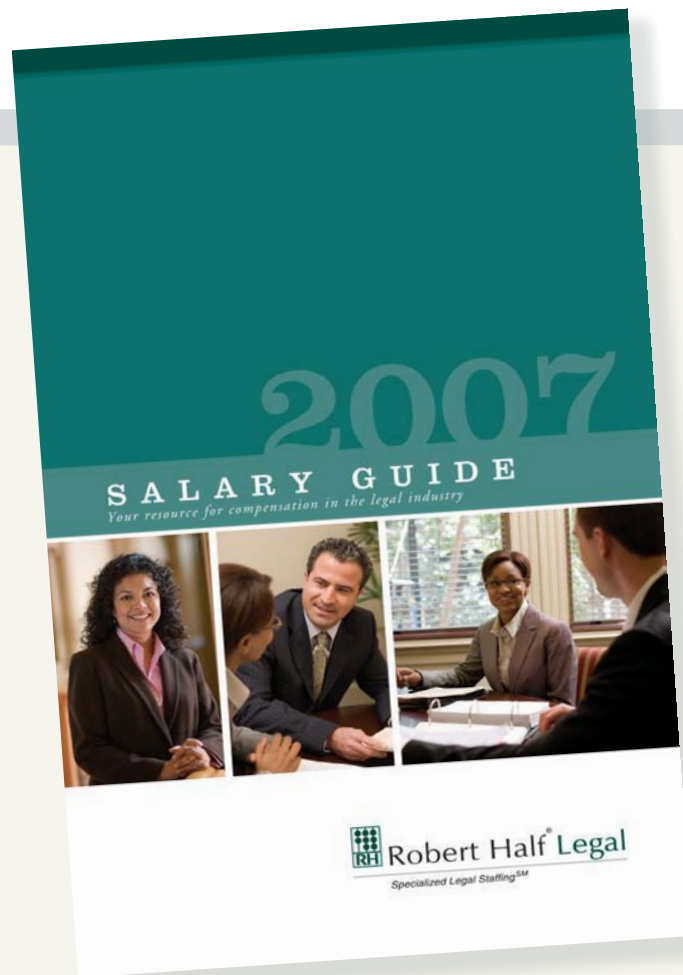
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Tim Bancroft
Vice-President of Sustainable Development, Technology and Public Affairs, Shell Canada

“There’s always been this concern that you might put programs in place and then somebody says, ‘Well, now look, everybody will just have to cut their emissions by 10 per cent.’ That dilemma is causing real heartache, I think, for corporate Canada.”

Part of the challenge is that Kyoto measures emissions using a baseline, and Canada has committed to reduce its emissions to 6 per cent below 1990 levels, but nobody has given industry a similar baseline.

Adding to this difficulty is a public unlikely to feel much sympathy for companies wrestling with this dilemma. “The government’s been dragging its feet for so long that by the time somebody gets some clear policy direction in Ottawa, there isn’t going to be a lot of time to ramp up,” says Ezekiel. “And, I’m not sure how much sympathy industry is going to get from the public if they start crying foul and saying, ‘You’ve only given us a year to prepare for the regulations.’ The public’s going to say, ‘You should have seen this thing coming for 10 years.’”

The regulatory murkiness could create big problems for companies in industries requiring long-term capital expenditures—equipment whose design life may be 10 years or longer—says Ezekiel. “That’s not the kind of stuff you want to get wrong and 10 years from now say, ‘oh, we have to swap that out and put

something better in because we misjudged what we would have to do to comply.”

Although nobody can say for sure what the regulations resulting from the Clean Air Act will look like, the bill tries to regulate air pollutants such as nitrous oxide and sulfur dioxide—two precursors to smog, nicknamed “NOx and SOx”. It also addresses greenhouse gases, and seeks to regulate fuel efficiency in vehicles. Ultimately, says Ezekiel, standards are going to be key, but it’s unclear whether the government will move towards fixed caps or go the emissions intensity route.

The United States is more aligned with the latter, he says. Another concept south of the border that could show up in Canada is what’s known as “BACT and MACT,” short for best available control technology and maximum achievable control technology. “It basically says, we’re not going to set a prescrip-

tive standard around what your emissions will be, but if you want to emit, you have to have a BACT on the stack to limit the amount of emissions.”

Ezekiel also anticipates regulations aimed at taking advantage of the capital cycle, requiring companies to replace older equipment with the best available technology.

For his part, Taylor suspects that with its Clean Air Act, the Harper government has indicated an intention to follow the U.S. lead, at least where air pollutants are concerned. He also thinks the bill has added considerable ambiguity to the government’s approach to climate change, because it blurs the distinctions between air pollutants and greenhouse gases.

“They want to say we’re doing something to make the air clean—and the implication is that you do something about climate change,” says Taylor. “I hope I’m wrong, but I’m very, very nervous that this government really doesn’t want to do anything for climate change.”

Alcan: Being proactive is good business

You might think the prospect of government stalling on climate change would be music to big industry’s ears, but that would depend on the corporation. Alcan, in fact, is outspoken about its

belief that a proactive approach is the way to go.

In 2005, the multinational teamed up with other prominent companies to send a letter to the prime minister requesting urgent action on climate change. And Alcan requires all sites operating under its umbrella to produce an inventory of all greenhouse gas emissions. It has also stated publicly that it aims to be climate neutral by 2020. In the past 15 years, it has reduced its direct smelter emissions by one-third even though production doubled.

“We want to do as much as possible all the time, across the board, not only in jurisdictions where governments are looking more closely at this question, but everywhere around the globe,” says Annie Carpentier, chief counsel with the Alcan primary metal group in Montreal.

To be seen as an industry leader is good for business, she adds. “We enjoy a ‘permit to operate’ from different societies around the world—because we use resources—and we think that long-term, nobody will allow us that right to operate if we are not doing it in a sustainable fashion.”

Carpentier points out that because Alcan is a company of some 70,000 employees, approaching sustainability proactively is also a matter of self-preservation. Sooner or later, she believes, the laggards will have to catch up. “I wouldn’t want to imagine a company of this size that is suddenly faced with changing regulations and a much more demanding environment. You cannot react to such a thing overnight.”

Shell: Public commitment to reduce emissions

Shell Canada Ltd. is also on the sustainability bandwagon. It made a public commitment in 2000 to reduce its emissions by 6 per cent below 1990 levels by 2008, and is on track to meet that target. The catch, explains Tim Bancroft, vice-president of sustainable development, technology and public affairs with Shell in Calgary, is that “unlike Canada, we haven’t stood still. In 2000, after we made that commitment, we started up a new business in the oil sands, and it puts out 3.5 million tonnes of CO₂ each year.”

Shell’s goal is to cut those emissions in half by 2010. Aiming to be carbon neutral is not realistic in his industry, says Bancroft, but his company aspires to do “no worse” in terms of greenhouse gases by producing oil from the tar sands than importing oil from places like Venezuela, the Middle East or the North Sea.

Bancroft says Shell is proactive on climate change because it’s good for business, but also because it’s the right thing to do. “If you save energy, you save costs,” he says. “But we also believe that big companies, big emitters—and we’re in both those groups—should show a little leadership here.”

Still, taking the lead can be unnerving, he admits. “You get worried, getting out ahead of the pack sometimes. You say

Asking Questions, Getting Answers... corporations weigh in on climate change

Coping with climate change is top of mind for many executives these days. Local, national and global movements have brought greenhouse gases and other environmental concerns to the forefront. They are shared by ordinary citizens—and shareholders—across Canada and around the world.

The UN Global Compact is a prime example. The compact outlines 10 principles that focus on human rights, the environment, labour standards and corruption. Companies that join the compact agree to be governed by those principles in the course of doing business. Since its launch in 2000, more than 2,500 companies from 90 countries around the world have signed on, including Canadian giants as Alcan, BCE, Enbridge, HSBC, and Hydro Quebec. Big U.S. participants include household names such as DuPont, Gap Inc., Hewlett-Packard, Nike, Starbucks and Coca-Cola.

Then there’s the Carbon Disclosure Project (CDP), a coalition of global institutional investors with more than US \$31.5 trillion in assets under management. Signatories include AIG, Goldman Sachs, Morgan Stanley and Merrill Lynch. These prominent investors have joined forces under the CDP’s umbrella to demand more information about the greenhouse gas emissions of 500 of the world’s largest quoted corporations.

Four years ago, when the CDP first surveyed the FT500, the response rate was 47%. In 2006, the response rate jumped to an impressive 72%. American companies responding to the CDP for the first time this year included American Express, Boeing, Home Depot, Disney and Wal-Mart.

The Dow Jones Sustainability Index (DJSI), also illustrates how sustainability is emerging as a core value in capital markets. Being listed as a DJSI company carries a certain cachet, conferring values [in the public’s mind] such as the honesty, integrity and sustainability of firms.

Last year’s Stern Review on “The Economics of Climate Change” (published October 2006) has been called the most comprehensive review ever carried out on the economics of climate change. Former World Bank Chief Economist Sir Nicholas Stern projected that unless something changes, “Our actions now and over the coming decades could create risks of major disruption to economic and social activity, on a scale similar to those associated with the great wars and the economic depression of the first half of the 20th century.”

Taken together, the UN Global Compact, the CDP, the DJSI and the Stern Report are evidence that the environment is starting to matter to corporations and investors. People are waking up to the fact that if nothing changes, the planet could reach a tipping point from which it may not be able to recover. ■

‘okay, we’ve done voluntary things, we’ve cut our emissions, great, and then you’re told to cut them 10 per cent anyway, just like Mr. X over there who hasn’t done anything yet,’ says Bancroft. “So you say ‘wait a minute, that’s not fair. Next time I should do nothing, and I’ll be rewarded for doing nothing’. That seems a bit perverse.”

For his part, Bancroft would like to see two things come out of the Clean Air Act: clear and fair targets—meaning that no industry gets a free ride while others are saddled with the burden of proof—and regulations that will get new technologies to work. Many of the technologies that could help the cause, such as carbon sequestration, are simply “uneconomic” at first, says Bancroft. “They need a bit of a push from government to collect taxes from people who don’t meet their targets, and invest the money in new technologies.”

There’s no evidence that being Mr. Nice Guy, in the absence of clear regulations, will lead to a healthier bottom line, Bancroft says. “Most Canadians will cross six lanes of traffic to save 0.1 cents a litre. If you say, ‘Here’s a premium product which is cleaner, which is lower in this, that or the other, please buy it,’ nobody comes to your shop,” he says. “They go somewhere else. So the only way we’ll

actually get to higher standards is [through] government mandate. It’s a bit of a depressing fact that you don’t necessarily get the bang you’d expect from doing things that are more socially responsible.”

A business question, not a legal question

Anne-Marie Sheahan, partner and head of the national environment group with McCarthy Tétrault in Montreal, agrees that the uncertain climate is creating more problems for good corporate citizens than for the foot-draggers because the many unknowns surrounding the Clean Air Act do not reward early action.

“Three years ago, CFOs were listening to initiatives to reduce greenhouse gases. They would say, ‘It’s coming, we’d better be well equipped, we’ll spend on this.’ Now they’re saying, ‘Ha! 2050. We’re not spending.’ It’s not a priority anymore. That’s probably true of most businesses,” she says. All of which leaves the do-gooders flapping in the wind, hoping they’ll find themselves at the forefront some day if the government ever delivers regulations with teeth.

It’s enough to make inside counsel wonder: Is it better for my company to be proactive, or to wait? “That’s a very good question,”

Hésitations et incertitudes

À l’heure actuelle, l’environnement réglementaire en matière de lutte contre les changements climatiques est pour le moins nébuleux. Comment l’avocat-conseil doit-il réagir?

Il y a quelque chose dans l’air, sans conteste inquiétant, qui touche les changements climatiques, le smog et la confusion générale dans le monde des affaires. Depuis le dépôt du nouveau projet de loi sur la qualité de l’air, les sociétés canadiennes réexaminent leur approche face à l’environnement.

Ce ne sera pas la première fois. Après Kyoto en 1997, le gouvernement libéral de Jean Chrétien ratifie le protocole en 2002 et propose un plan vert, qui sera écarté par son successeur, Paul Martin. Son ministre de l’environnement, Stéphane Dion, présente en 2005 le Plan national de lutte contre les changements climatiques, à son tour expédié aux oubliettes avec l’arrivée au pouvoir de Stephen Harper.

Sitôt déposé, le projet de loi conservateur suscite des critiques tous azimuts. La collaboration du chef du NPD, Jack Layton, a permis de sauver les meubles en renvoyant le projet de loi devant un

comité spécial, question d’apporter encore des modifications.

Selon Ron Ezekiel, associé chez Fasken Martineau DuMoulin à Vancouver, il s’agit de savoir si le gouvernement fixera des cibles à court ou à long terme visant la réduction des gaz à effet de serre (GES). « Difficile à dire », conclut-il, non sans raison. Par contre, l’incertitude persistante complique la vie des avocats-conseils, en quête de directives claires.

Si les questions viennent facilement à l’esprit, les réponses se font rares. Comment gérer le risque et préparer l’entreprise à se conformer au cadre réglementaire à venir? De quelles pénalités écopera la société qui prend du retard à s’adapter aux nouvelles normes? Encore faut-il qu’il y ait des obligations à respecter, fait remarquer Ezekiel, qui déplore l’absence de clarté.

Alors que les grands émetteurs sont laissés seuls à deviner le futur, certains tentent

déjà d’identifier comment réduire leurs émissions à moindre coût, ou participent à des consultations publiques, question d’avoir un aperçu des intentions du gouvernement.

D’ailleurs, pourquoi attendre? N’est-il pas souhaitable d’être proactif et d’effectuer un virage vert le plus tôt possible, si ce n’est que pour se rendre plus attrayant aux yeux des investisseurs? Le risque, c’est de se précipiter dans la mauvaise direction, croit Gray Taylor, associé chez Bennett Jones à Toronto. « Voilà le dilemme qui cause du chagrin aux sociétés canadiennes », affirme-t-il.

Car en ratifiant Kyoto, le Canada a accepté de réduire de 6% ses émissions sous le niveau de 1990. Mais personne n’a fourni de point de comparaison semblable aux industriels. Ceux-ci, déjà en manque de sympathie publique, devront rapidement s’adapter aussitôt qu’une politique claire sera mise en place—malgré les dépenses d’investissement à long terme

says Sheahan. “But it’s a business question, not a legal one. The legal answer to that question is you don’t have to move until you’re hit. Well, that’s the dumb legal answer. The smart answer is to see things coming. Be involved in working at what’s eventually going to hit you. Stay informed, stand according to what you firmly believe will happen in the short-to-medium term.”

Of course, inside counsel also needs to make sure their board of directors stays on the right side of the law—not just the laws created by government, but a company’s own “internal laws.” This is particularly important, Sheahan says, for companies like Alcan and Shell that have made a public commitment to go green. If a firm is making voluntary emissions reductions, creating their own internal programs, showing them off, and engaging in non-financial reporting, then they’ve chosen a path, and they’re well-advised to stick to it.

“There are business decisions made by the board, by upper management, about where the company is going and how it’s

going to get there, and those are policy decisions that people have to follow and integrate,” says Sheahan. “Inside counsel’s job is not just to look at the law, but also look at the company’s inter-

“ We believe that big companies, big emitters – and we’re in both those groups – should show a little leadership here. ”

Tim Bancroft, Shell Canada, Calgary

nal law, if you wish, and make sure all of that jibes.”

At this stage, betting on what may come of the Clean Air Act is a mug’s game. The only sure thing, says Sheahan, is that smart companies are “keeping their ear on the track”, so that when the freight train finally rounds the curve at top speed, they’re prepared. ■

Patti Ryan is an Ottawa-based freelance writer.

nécessaires. « Le public va leur dire que cela fait dix ans qu’ils auraient dû voir ça venir », affirme Ezekiel.

Sans savoir à quoi ressemblera la réglementation résultant de la nouvelle loi sur la qualité de l’air, nous savons déjà que celle-ci tente de réglementer les polluants de l’air, tels les oxydes d’azote (NOx) et les oxydes de soufre (SOx), tous deux des polluants précurseurs de smog. Et à l’instar des États-Unis, les objectifs auxquels ces règlements seront assujettis pourront être basés sur le niveau d’intensité de GES, plutôt que sur des plafonds fixes. Autre concept qu’on pourrait importer au Canada de nos voisins du sud: ceux qui veulent émettre pourront le faire à condition d’utiliser les meilleures techniques de lutte contre la pollution. Mais l’ambiguïté règne, soutient Gray, car le gouvernement confond intentionnellement deux objectifs différents—soit l’amélioration de la qualité de l’air et la lutte contre les GES.

Passons aux choses sérieuses

Que le gouvernement tente de gagner du temps sur le dossier des changements

climatiques, voilà qui devrait faire plaisir aux grands émetteurs. Pourtant, ce n’est pas le cas.

En 2005, Alcan s’est joint à un groupe de grandes entreprises canadiennes qui a demandé au gouvernement d’agir avec plus de détermination dans la lutte contre les changements climatiques. Et de sa propre initiative, le fabricant d’aluminium a élaboré un inventaire de ses émissions GES et a réussi à réduire les émissions en provenance de ses fonderies. Ces initiatives font partie d’une stratégie globale, explique Annie Carpentier, directrice des services juridiques pour le Groupe Alcan à Montréal. Avec 70,000 employés à travers le monde, elles sont dictées par l’instinct de préservation de la multinationale, ajoute-t-elle.

L’environnement est également une préoccupation pour Shell Canada qui, en 2000, a annoncé ses intentions de réduire ses émissions de 6% sous le niveau de 1990 avant 2008, malgré les activités de la pétrolière liées aux sables bitumineux en Alberta. Tim Bancroft, vice-président, développement durable chez Shell Canada

reconnaît l’impossibilité de réduire l’empreinte de la société de sorte à n’avoir aucune incidence sur le climat. C’est la nature de l’industrie. L’objectif, par contre, est de ne pas être plus nuisible en termes de contribution aux GES que le pétrole importé du Venezuela ou du Moyen Orient. Il considère que c’est une question de leadership, malgré l’incertitude qui règne au plan législatif.

Malheureusement, les bons citoyens corporatifs canadiens qui adoptent des mesures hâtives ne sont pas récompensés pour leurs efforts.

Alors que faire ? Vaut-il mieux être proactif ou attendre ? « C’est une décision d’affaires », croit Anne-Marie Sheahan, associée chez McCarthy Tétrault à Montréal. Quant à l’avocat-conseil, son rôle consiste principalement à être à l’affût des développements dans la législation environnementale et de garder un œil sur le court et moyen terme. Et bien sûr de s’assurer que le conseil d’administration respecte les lois publiques, ainsi que les lois internes de la société. ■

— Yves Faguy