Climate change lawyers grapple with uncertainty

BY ROBERT TODD
Law Times

Lawyers continue to see great opportunity in the area of climate change law, but a lack of regulation continues to force practitioners to remain pliable and willing to read the tea leaves.

Provincial governments in Ontario and British Columbia have now introduced separate legislation to shape their provinces' shift to a greener economy, but climate change lawyers continue to wait for a firm program from the federal government. That step, however, isn't expected any time soon.

Jason Kroft, a leading member of Stikeman Elliott LLP's emissions trading and climate change group, says the lack of regulatory certainty means it's still "early days" for this legal area.

"There is a lot of internal thinking and writing and developing our expertise, which we're doing by writing on topics of interest or reading and exchanging internally. The anticipation is, once there's more certainty on the regulatory front, once the economies are improved and climate change becomes a real priority for businesses, I think we're going to see the pace of activity increase."

In the meantime, Kroft says work in this area of law falls into four main categories. Much of it comes from companies and organizations outside of Canada, such as investment banks and financial institutions, that trade securities and commodities or provide financial products. They look to lawyers like Kroft to prepare advisory briefs that will paint a picture of the regulatory framework within Canada for the trading of emissions credits.

Work also comes from governments that are involved in large-scale power projects and looking for a better understanding of the environmental protections that must be in place as well as the possible impact of a future emissions-trading regime.

The third area keeping Kroft and his climate change law colleagues busy is advisory work for organizations participating in voluntary emissions-trading schemes. Others are looking for legal advice as they make purchases they believe will have value when a full-scale credit-trading system becomes reality. His firm also advises companies that actively trade credits in Alberta, which has had a framework in place since 2007.

Finally, public companies come to lawyers like Kroft to help create a system for documenting and disclosing their carbon footprint.

Davis LLP associate Andrew Lord says his firm has determined there's not enough going on in climate change law to fill an entire practice group's day. However, issues related to climate change tend to pop up in typical files, such as financing deals or asset sales, that happen to involve businesses with a high emissions profile or may be threatened by climate change.

Jason Kroft expects more work for climate change lawyers once governments provide a better idea of what the regulations will be.

Regardless, lawyers in Davis' climate change practice group have enjoyed growth thanks to Ontario's Green Energy Act and British Columbia's Clean Energy Act.

"Both of those are dual-purpose initiatives," says Lord. "They're environmental initiatives to the extent that they move us to sources of power that have a much kinder greenhouse-gas emissions profile than traditional thermal generation. But they also create a lot of economic opportunity in the provinces by attracting investments in that type of generation and in the professional services and supply of equipment that's required to implement that new generation. So we've seen a lot of activity there."

At the same time, Lord says the lack of certainty in this emerging area of law means climate change practitioners must constantly be on the lookout for regulatory developments in multiple jurisdictions.

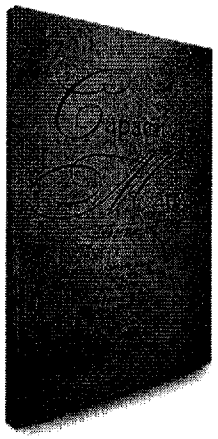
"Because it is shifting so quickly, it sometimes feels like there's a certain amount of crystal-ball work that needs to be done, but that can still be helpful to clients who are trying to do scenario planning and anticipate what they're going to have to do in the future."

Meanwhile, legislative certainty doesn't appear to be on the horizon. Kroft notes the federal government has indicated its intention to wait for moves from the United States before creating a Canadian approach. With the current political situation south of the border, in which representatives are embroiled in mid-term elections, federal legislation isn't likely until next year at the earliest.

"My sense is, if there's good federal legislation in the United States, at least for a lot of players, that will tell them what's the risk, what's the cost for carbon, which is the question people always ask," says Kroft.

The uncertainty has kept many companies from moving forward with climate change efforts, but the "sophisticated" ones are eager to get ahead of the curve, he adds.

"We'll go to our clients and we will try to leave a message that, in the same way when you make a major capital investment or a [mergers-and-acquisitions] activity or structure a prospectus, you need to understand a number of attributes, you need to keep climate change as part of that. It's not the only factor and it's probably not the biggest factor but it is a factor that should be measured, assessed, and understood."



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