Businesses feel the heat from global warming

By Jeff Lowe and Nicole McLoughlin

There may be no end in sight to the debate over global warming, but that doesn't prevent it from casting a long legal shadow over Canadian businesses.

The implementation of the Kyoto Protocol has been inconsistent around the world, often caught in political headwinds. For example, the U.S. signed the protocol in 1997 but the Bush administration refused to ratify it four years later. However, despite a lack of serious federal initiatives in Canada and the U.S., various provinces, states and corporations have been taking steps to address greenhouse gas (GHG) emissions.

The *Greenhouse Gas Reduction Targets Act*, recently enacted in B.C., requires the B.C. government to become carbon neutral by 2010, among other things. The news release announcing the Act stated that the Act is the first in a series of legislative initiatives that will be brought forward this year.

Additional legislation will regulate emissions from different sectors, including the creation of a mandatory cap-and-trade system.

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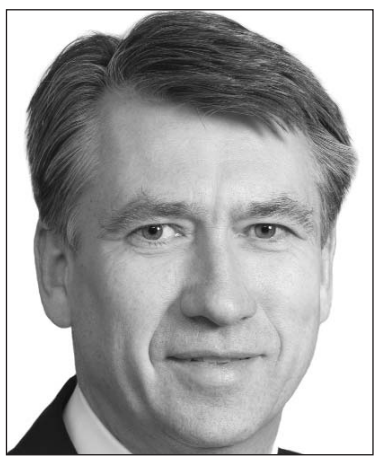

Jeff Lowe

This system permits heavy GHG emitting corporations a set amount of harmful emissions each year. Companies that fall below the assigned cap earn carbon credits, which can then be sold to companies who exceed their cap. Companies that exceed their cap and that cannot purchase enough credits will be penalized. Until now, cap-and-trade systems in Canada, such as the Montreal Climate Exchange established in July of 2006, have been voluntary.

Despite the political confusion swirling around the implementation of the Kyoto Protocol, the commercial market will be driving the issue forward. Provincial legislative schemes are beginning to quantify both the need for and value of carbon credits to meet emission targets. Heavy emitters of GHG have to be concerned about how they will meet the targets, or purchase the credits to bring them below their permitted level of emissions.

The emergence of mandatory cap-and-trade systems in Canada is expected to amplify the importance of the currently fragile voluntary climate exchanges. In the European Union, where mandatory cap-and-trade systems already exist, the current estimated value of carbon trading on their climate exchange, the Emission Trading Scheme, is $59 billion annually.

In addition to the expected mandatory cap-and-trade systems, Canadian lawyers should be concerned about the legal issues related to global warming emerging in the U.S. For example, recent U.S. lawsuits against heavy emitters of GHGs have caused some observers to suggest that lawsuits related to global warming are following in the footsteps of those against tobacco companies.

Some of these lawsuits have been filed by various state governments against power plants and auto manufacturers, alleging that the companies have created a public nuisance by releasing or producing products that release GHG emissions and are thereby contributing to global warming.

Perhaps more remarkable, however, is a petition filed with the Securities and Exchange Commission (SEC) which, if successful, could result in significant impacts to all publicly-traded companies. A group of investors representing over $1.5 trillion worth of assets is seeking the issuance of an interpretive release by the SEC to clarify corporate obligations to disclose climate risk.

The group asserts that corporations must perform a thorough review of potential climate risks and disclose any material risks, including physical risks associated with climate change; financial risks and opportunities associated with present or probable GHG regulation; and legal proceedings related to climate change.

These are far-reaching disclosure requirements. The petitioners suggest that such obligations would require full balance sheet disclosure by lenders whose borrowers were located in at-risk areas such as coastal properties. For example, the physical risk of rising sea levels caused by climate change damaging the coastal properties could impact the lender and would have to be disclosed.

Amid these changes, lawyers will need to forewarn clients of the potential litigation, regulation and disclosure requirements that may apply to them. The issue of carbon credit ownership will need to be addressed. The message is clear: regardless of our acceptance of the implications that GHG emissions have on our environment, the effects of the global issue of climate change, and the initiatives to reduce GHG emissions will impact the way we conduct our practices.

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Guidelines expose Bureau's power to release confidential information

By Dela Avle

When is confidential information no longer confidential? In some situations, the Competition Bureau may release your client's information to third parties without informing you, whether or not you submitted the information voluntarily or by compulsion.

The recently released *Information Bulletin on the Communication and Treatment of Information under the Competition Act*, issued by the Competition Bureau, updates the bulletin released by the bureau in 1995. It takes note of developments in competition law enforcement since the issue of the previous bulletin and provides more practical guidance to the private sector on issues of confidentiality. It reflects subsequent amendments to the *Competition Act* and the growing internationalization of competition law, as well as a corresponding rise in collaboration among international competition agencies and increasing demands for information from third party litigants who are often situated in other countries.

Sections 10 and 29 of the Act offer protection for confidential information provided to the bureau. Section 10 of the Act deals with inquiries by the commissioner of competition into alleged contraventions of the Act, and states that all inquiries are to be conducted in private. Section 29 provides protection for nearly all information, including documents, provided to the commissioner or to persons who perform or have performed duties in the administration or enforcement of the Act, excluding information obtained through the use of powers under the *Criminal Code*.

However, the bureau has the discretion to communicate information in four limited circumstances: (i) to a Canadian law enforcement agency; (ii) for the purposes of administration or enforcement of the Act; (iii) when the information has already been made public; or (iv) when the information has been authorized by the person who provided the information.

The bulletin reiterates the fundamental principle that confidential information submitted to it will be protected from disclosure, and also explains when the exceptions apply. As a general principle with very limited exceptions, the bureau does not provide notice to any person who has provided it with confidential information before exercising its discretion to communicate the information pursuant to any of the exceptions.

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