



Farris lawyers Elizabeth Harrison and Chris Gora features in the September 2008 issue of Canadian Lawyer magazine.

Clean Tech Fuels Growing Client Base

It's about much more than creating sustainability for future generations, exemplifying a conscience for global warming, or generally just making the world a better place — although all of the above add nobility of purpose. Lawyers who are focused on facilitating clean technologies see a wealth of opportunity to cash in amid what is shaping up to be an otherwise dormant investment market.

As appeared in the September 2008 issue of Canadian Lawyer magazine by Daryl-Lynn Carlson.

Indeed, investment by venture capital funds in clean technologies is on the rise. Last year, private investment into the sector rose by roughly 85 per cent over the last two quarters, while contributions by venture capital firms in the United States have been increasing by an average of 18 per cent annually. The Paris-based International Energy Agency, to which 27 countries officially belong, recently projected that \$45 trillion would be spent globally on alternative energy technologies to cut carbon emissions in half by the year 2050. "That's in the range of a trillion a year," observes Blair Horn, a partner in Fasken Martineau DuMoulin LLP's securities and mergers and acquisitions group in Vancouver. "It's really something when you look at the money involved. The size of the market is just staggering."

Clean tech is a catch-all term to describe the development of environmentally friendly energy products and services that will serve to reduce the world's carbon emissions. The term was evidently coined by a Canadian venture capitalist and, with the rise in oil prices and growing global consciousness, has become a formal and official sector of its own. For lawyers serving clean-tech clients, it's proving to be an exciting yet complex area of practice as the sector matures. "At the end of the day, what it comes down to for us is we really have to understand our clients' businesses and help them on the novel issues," says Horn. "But once you're over the new issues, a lot of elements are what we would normally do in our day-to-day practice."

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One of Horn's clients, Lignol Energy Corp., is a Canadian company developing technology to produce fuel-grade ethanol from cellulose obtained largely from wood waste products. As the company is blazing new territory, Horn and his Faskens colleagues who were involved on the file also had to be creative. "One of the challenges there was understanding what was possible in the patent portfolio and taking the onion and peeling the layers to be able to see all the possible applications of their technology beyond the immediate application for fuel ethanol," he says. "I know that's one area in which Lignol felt we were able to add a lot of value."

Faskens also acted for the underwriters in connection with Pristine Power Inc.'s initial public offering — completed earlier this year — and Day4 Energy Inc.'s IPO last December. These IPOs are a testament to the sector's vibrancy. "They were done in a really difficult finance

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market. The public markets just weren't there, and if you go back and look at the statistics on recent IPOs, Pristine and Day4 are two of only a few IPOs completed recently," says Horn. Pristine was approximately \$55 million and Day4 upwards of \$100 million. "To be able to do an IPO in this market is a significant accomplishment," he says. "But I think part of that is because they are bringing clean technologies to the market and the market is receptive to that." It helps that B.C. has introduced some legislative incentives. Over recent years it has enacted several pieces of legislation to ensure the province lowers its greenhouse gas emissions.

NEW PRACTICE GROUPS

The clean-tech sector is flourishing clear across the country. So much so that two Ontario-based firms have stepped out and established formal clean-tech practice groups. Last fall, Ogilvy Renault LLP announced the launch of its new practice group, headquartered at the MaRS Discovery District, an innovation centre in Toronto. Gowling Laffleur Henderson LLP earlier this year formalized its clean-tech practice group, also establishing an outstanding product achievement award in partnership with CATAAlliance, Canada's largest technology association.

At Ogilvy Renault, the practice was formalized by pulling together expertise from the firm's intellectual property, energy, and business practices. The group comprises 39 lawyers. "It's almost like an industry vertical," or business practice, with a focus on innovation, explains Richard Sutin, who, with Andrew A. Taylor, heads the Toronto-based group. The firm's clients range from innovators working on wind farms, geothermal projects, fuel-cell developers and emissions trading, with most in the renewable energy sector. Sutin's practice focuses on corporate finance, transactions, and securities law, while Taylor is versed in energy and environmental regulatory law. Taylor says the number of clients in the clean-tech sector has risen markedly while the practice extends globally.

Gowlings similarly pooled its expertise, although the practice group didn't physically relocate. It taps into the firm's 150 intellectual property lawyers and another 100 in its business law group, which together it touts as an integrated technology industry group. Within that, David Pamerter heads up the clean-tech practice. "Our experience is clients want to see service providers who are focused, and many clients in the clean-tech group see themselves as being in a distinct industry from energy or life sciences or technology — or even environmental, for that matter," says Pamerter, of the decision to separate the clean-tech group. "So in some ways we're responding to market demand. But there's also a knowledge set that goes with that." Still, other lawyers are regularly involved with the group. Carlton Mathias, a partner in the firm's energy and infrastructure group, is called upon regularly to advise energy developers. "While we have an emerging technologies group and a clean-tech group, there is overlap certainly in the energy world," he says.

Says Pamerter: "There are so many challenges in this area of practice, it spans all practice areas. It's a huge learning curve." He says the formalized a clean-tech practice is still a work in progress. "This is an evolutionary process. I don't pretend we're the end of the road yet, by any means." While creating a separate practice group works for some firms, others are finding different ways to market and position their clean-technology expertise.

Borden Ladner Gervais LLP has placed its clean-tech practice under the auspices of the firm's Ottawa-based innovation focus group. "The focus group is sort of like a marketing entity," explains group leader Marc Babinski, an IP lawyer with years of experience working with venture capitalists. "The firm supports it because they see an opportunity." He says the firm has also recently introduced a climate-change focus group that is working closely with his innovation section.

MANY WAYS TO MARKET

But regardless of whether a law firm with any type of business practice chooses to tag a name on its services that cater to clients in the new clean-tech realm, its lawyers will inevitably be working on their files. "It's so pervasive that whether or not they've organized themselves, from a business-development perspective, into a branded group, lawyers are going to be working



About Elizabeth Harrison, Q.C.

Elizabeth Harrison provides legal advice on various matters including mergers and acquisitions; corporate governance issues; establishment of commercial, “not for profit” corporations to effect public-private partnerships; drafting legislation; corporate reorganizations; and arrangements to affect merger of companies.

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on this stuff,” says Babinski. “Now it’s kind of a race to see who can carve out a dominant market position in the various sectors. And you do that by hiring new people, drawing on your strengths, being institutionally nimble enough to get your people reset.”

Cassels Brock & Blackwell LLP, for instance, has not officially set up a clean-tech group, but it is getting plenty of clients from within the sector. “Certainly there’s no question that larger, transactional-based firms are probably having a slower year than usual, but this is one sector, the clean-tech sector, that shows no signs of slowing down at all,” says Colin Ground, a partner in the firm’s business law group. The firm’s recent clients include a venture capital fund, biofuels developer, and a wind-power provider. Ground says the emerging clean-tech sector often requires an unconventional approach simply to acquire a thorough understanding of a client’s business. “When people come to you talking about transforming algae into a biofuel that will run engines of cars or heat homes, you need to sit down and learn that business, to a certain extent, so that when you’re negotiating with an investor about certain intellectual property claims or representations and warranties that are required in any agreements, you can better understand what your client is able to provide,” he says. “The only reason that this is significantly different from other sectors is, oftentimes the space will be as unknown to the investor as it is to the lawyer.”

Accordingly, Ground and colleague Jim Ayres, a partner in the municipal, planning, and environmental law group, recently completed a course at the University of Toronto’s Centre for the Environment on carbon trading in the international market. “We are at the very early days of this green technology space, but it’s going to be a very active sector for very many years to come,” says Ground. “The more expertise we can build up, the better we’re able to serve our clients, and in carbon trading there will certainly be a boatload of activity. . . . One of the most rewarding things about this field is, you get to learn a lot about a brand new industry and what companies are doing. And it’s going to help clean up this planet a bit, which isn’t so bad.”

Elizabeth Harrison, a partner at Farris Vaughan Wills & Murphy LLP in Vancouver, acknowledges it can take more time to understand a client’s clean-tech business than a conventional startup. She headed a legal team of a half-dozen lawyers at the firm in Day4 Energy’s IPO. “We spent an awful lot of time with the client and a lot of time at their plant,” she says. “There aren’t very many solar companies, although there were some that went public in the

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-Chris Gora

U.S., so we were looking at what and how they did things, although Day4 differentiated from them. So to really understand the difference, we had to see it.” She points out that Day4 has no Canadian clients yet but will be selling its solar power to Germany, a world leader in clean-tech energies, and to California, which is emerging as the most progressive jurisdiction in the U.S.

While Farris also hasn’t created a formal clean-tech practice group, Chris Gora, a lawyer in the firm’s IP group, is focusing his practice on the emerging sector. “There are just more companies out there that are gaining traction in the area and coming to us,” he says. As well, he is building a solid network of contacts. “A lot of this clean technology is being developed at a pretty rapid pace now,” he observes. “What I like about it is there is everything from patent licensing issues [to] financing, regulatory issues, carbon offset credits, and it’s got a real international scope to it.”



About Chris Gora

Chris is a member of the firm's Intellectual Property and Corporate & Securities Law Practice Groups, with a growing practice in clean technology. Chris assists his clients in structuring and general corporate and securities matters, equity and other financing, technology partnering and licensing transactions, collaboration and development agreements, and regulatory compliance advice.

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At Faskens in Vancouver, Paul Wilson, a partner and head of its regional public-private partnership and national energy and environmental groups, has a complement of project-based files he works on with a team of lawyers. Following the B.C. government's call for proposals for clean energy sources, the firm acted for three wind-technology clients, including the 25-megawatt Mount Hays Project in Prince Rupert by Katabatic Power Corp., a 180-megawatt project from Dokie Wind Energy, and Bear Mountain Wind Ltd.'s 120-megawatt project. It took roughly three years working with the clients to see the projects through, he says. "That's a common time frame after getting the permit agreement after putting into place all engineering and construction agreements and getting project financing," explains Wilson. "It's project-based work rather than transactional work. In project-based work, what the client needs is a team of lawyers who understand the industry and are generally able to take them through all the steps to do the project." The experience provides valuable expertise. "You end up with a lot of project-specific knowledge." Lawyers at Faskens are able to share what they glean from clients with a co-branding initiative it has undertaken with the Seattle-based law firm Perkins Coie LLP, through which clients are updated monthly about developments within the Western Climate Initiative, a collaboration that was launched by the governors of Arizona, California, New Mexico, Oregon, and Washington to develop regional strategies to address climate change. The initiative enables the firm to market its wealth of expertise to the clean-tech sector without breaking out a formal practice group.

Yet firms of all sizes are able to profit from the growing number of business startups in clean-tech sector. Dianne Saxe, a Toronto-based certified specialist in environmental law, is a sole practitioner who traditionally advises clients on environmental issues ranging from contaminated sites, audits, approvals to compliance. In recent years she's worked with several clients launching innovative alternatives for energy and waste, along with carbon-emissions trading. "The social pressure is helping," she says of the sector's skyrocketing popularity. "It's coming from consumers, shareholders, and employees, and innovators are leveraging that pressure to inspire incentives to go to clean tech." She says she expects the current downturn in Ontario's industrial base will serve as a boon to the clean-tech sector. "This is pushing people harder and moving us forward and in the longer term, there's a lot of money to be made by people who learn how to create alternatives. This is definitely an area of practice that is here to stay."