



The Energy Playbook

2022 YEAR IN REVIEW

MLT AIKINS

WESTERN CANADA'S LAW FIRM

The Race is on to Net Zero

2022 was a boom year for new wind power, solar power and battery storage projects in Alberta. Or should we say BOOM! considering that more than 15,000 megawatts of renewables are under construction, approved or announced. The jaw-dropping statistics are discussed in *The Alberta Boom in Renewable Energy*.

All the Western Canadian provinces were making their own moves towards net carbon zero this year, as summarized in *The 2022 Roundup of Energy Projects and Programs in Western Canada*.

This year Canadians also asked themselves how to help out their friends in Europe during the winter, to cope with Russia's cutoff of natural gas supplies. We explore this further in the *Canada's Hydrogen Alliance with Germany* article. Sadly, it turns out that little additional energy can be exported this year due to a lack of infrastructure, although more may be possible in the future.

Indigenous-led energy projects are hitting the mainstream in Western Canada, as Indigenous organizations and individual communities seek ways to supply their own needs and become players in the industry. We are pleased to feature interviews with participants, discussing their perspectives.

Federal-provincial jurisdictions in the energy field were a prominent topic in 2022. A *Net Zero Electricity Grid by 2035* is a federal "goal" that is morphing into a "mandatory requirement" and we consider what the Supreme Court of Canada might have to say about that, as well as other jurisdictional issues.

2022 saw an uptick in legal enforcement against companies who are "overly promotional" in describing their sustainability practices, and the article *Greenwashing Enforcement* discusses how general counsel, company leaders and boards of directors can manage the new legal risks. And when a company decides to make an energy play to achieve its ESG goals, that often means an infrastructure project, something that is explored in the article *Green Energy - Meet Infrastructure Planning*.

2022 was also a boom year for changes in the rules of the game. We summarize the many significant pieces of legislation, regulations and litigation that came at us in 2022, at the federal level and in the four western provinces. Public companies will need to add the acronym TCFD to their vocabularies as Canadian Securities Regulators propose new, mandatory reporting requirements for climate-related matters. A Canadian market for trading carbon credit offsets took its initial steps with a regulation for landfill credits. Not to be ignored are the implications for Canadian industry of the energy provisions in the \$2 trillion *U.S. Anti-Inflation Act* (that's \$2 trillion in U.S. dollars if it matters).

We hope you enjoy reading about all of this and more, in the *2022 Energy Playbook*!

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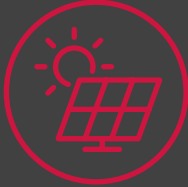
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Alberta's Boom in Renewable Energy

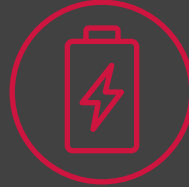
2022 was a boom year for constructing renewable energy projects in Alberta.



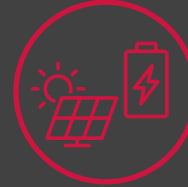
6,362 MW
WIND POWER



6,309 MW
SOLAR POWER



356 MW
BATTERY STORAGE



2,656 MW
COMBINED SOLAR
& STORAGE

The Alberta Electric System Operator (“AESO”) [reports](#) that more than 15,000 MW of new generation projects are either under construction, have received approval or have been announced by proponents. That total includes 6,362 MW of wind power, 6,309 MW of solar power, 356 MW of battery storage and 2,656 MW of combined solar and storage. To put these numbers in perspective, the massive Site C hydroelectric plant under construction in British Columbia will have a capacity of 1,100 MW.

The AESO publishes a report on applications for connection to the Alberta electricity grid. The March 2020 Report indicates that ***an astonishing 61 wind, solar and battery storage projects larger than 100 MW in size are in the “active” queue with anticipated in-service dates in 2022, 2023 and 2024.***

While not all of the projects in the queue will come to fruition, the scale is breathtaking. In its [2022 Long-Term Transmission Plan](#), the AESO forecast the following:

“The Reference Case forecasts the development of 12,193 MW of new or substantially modified generation in Alberta over the next 20 years. The near terms sees a large increase in both renewable and thermal generation driven by recently announced projects that have met the AESO’s project inclusion criteria. The longer term (post 2026) sees more modest generation additions ...”

[Many observers say](#) the current boom is due to Alberta’s market framework as well as favourable natural conditions for the generation of wind (breezes off the foothills) and solar power (number of sunny days). Renewable project developers do not have to wait for a utility to issue a request for proposals as in other provinces, it is an investment decision. Companies can sign power purchase agreements directly with producers for their own use or for offset credits, allowing them to meet their internal or external GHG goals. The financial security provided by these agreements allows producers to build renewable projects without market risk.

[Said](#) Miranda Keating Erickson, vice-president of markets at the AESO:

“There is a rush in Alberta right now because there’s lots of opportunity and companies are wanting to get their foot in the door first — because at some point, there is sort of a natural limit.”

The Land of the Amazons

Amazon has two energy plays underway in Alberta.

Amazon has a long-term power purchase agreement to buy 80 MW of the output of the Latham Solar Project, southeast of Calgary, two thirds of the total capacity of the plant. In February 2022, Lathom Solar applied to the AESO for transmission system access for the project. Lathom plans to construct 115 miles of new transmission to connect to an existing AltaLink 138 kV line. A needs assessment is underway. If approved, construction of the line will begin in February 2023.

Amazon has also announced a major energy purchase from Travers Solar, a \$700-million 465 MW project, which developers say will be the largest solar photovoltaic project in Canada and one of the largest in the world.

Greengate Power Corporation is the developer of both projects.



Canada's Hydrogen Alliance with Germany

As a result of Russia's interruption of natural gas exports to Europe, there is a tremendous opportunity for any supplier who can overcome the technical and regulatory hurdles and start exporting energy, particularly hydrogen.

On August 23, 2022, Prime Minister Justin Trudeau and German Chancellor Olaf Scholz signed the *Canada Germany Hydrogen Alliance* (the "Hydrogen Alliance") in Stephenville, Newfoundland. Chancellor Scholz said his country is taking steps to seek alternative energy resources and is expediting building new ports and pipelines, while also keeping in mind German climate goals. He said:

"That is the basis on which we now talk to other countries that have the opportunities. Canada is one of them. We talk to these countries in order to help us to tap new input sources."

The GH2 Project

One of the proponents of the Hydrogen Alliance is Nova Scotia businessman John Risley. Risley is a director of World Energy GH2, which has announced plans to construct a wind farm at Stephenville and use the energy to produce hydrogen for export (the "GH2 Project"). The first phase includes up to 164 onshore wind turbines, with energy production to begin in three years. Long term plans call for tripling the project's size. The project capitalizes on the abundant wind resource in western

The Canada Germany Hydrogen Alliance

The [Hydrogen Alliance](#) is a non-binding document intended to facilitate the trade of hydrogen and its derivatives between Canada and Germany, with a target to have initial exports begin in 2025.

Canada commits to collaborate with the provinces and territories through the Regional Energy and Resource tables, and with the private sector. Canada commits to leverage the existing \$1.5 billion Clean Fuels Fund and the \$8 billion Strategic Innovation fund Net-Zero Accelerator. For its part, Germany will support its domestic importers of hydrogen in establishing an international trade corridor with Canada.

Other features of the Alliance include:

- Development of codes, standards and regulations for the production, distribution, trade and use of hydrogen;
- Development of a common methodology for determination of carbon intensity of hydrogen;
- Research on hydrogen production, infrastructure and supply chains; and
- Facilitate industry cooperation through a task force and engagement sessions.

Newfoundland. Total investment in the project could reach \$12 billion. In May 2022, Risley [announced an agreement](#) with First Nation partners to acquire the Port of Stephenville, to be used to ship the hydrogen.

In August 2022, the provincial government indicated that an environmental impact statement [will be required](#) for the project. Items to be addressed include the locations of the wind turbines and other project facilities, and the potential impacts on protected areas, private land, traditional land uses, flora and fauna. Arrangements for [connections](#) to the power grid will also need to be developed with Newfoundland and Labrador Hydro. The GH2 Project will produce up to 1,000 MW of energy. Currently, the grid's entire capacity is 2,000 MW.

Green or Blue?

Hydrogen produced from the GH2 Project will be considered "Green Hydrogen" because it is produced from wind power, a non-GHG emitting energy source. The Premier of Newfoundland and Labrador has mentioned the potential to use current and undeveloped hydroelectric plants to produce additional green hydrogen.

Hydrogen can also be produced from natural gas and other hydrocarbons, and that is considered "Blue Hydrogen." The production process involves stripping out the carbon, and the resulting Blue Hydrogen can be counted towards achievement of Canada's 2030 and 2050 GHG targets. Hydrogen containing a residual percentage of carbon can also be produced, and **carbon intensity** measures the amount of carbon.

In his public remarks, Chancellor Scholz indicated a preference for green hydrogen. Some believe that over the long term, suppliers of green hydrogen will have a competitive advantage over blue once they overcome current shortage challenges.

Getting it There

The GH2 project will produce hydrogen and ammonia. Hydrogen can be converted to anhydrous ammonia. Initially, it may be more practical to transport ammonia to Europe, rather than hydrogen. Ammonia liquifies at a lower pressure than hydrogen, and the transportation and storage of ammonia has a proven track record and is understood by industry. Hydrogen on the other hand is still an emerging technology, and more robust facilities will be needed for its large scale transportation and storage.

LNG - the "Short Term" Solution?

During the meetings in Stephenville, the Prime Minister [was questioned](#) about exporting liquified natural gas ("LNG") to Germany. He indicated that Canada would explore whether it makes sense to export LNG "in the short term" and whether there is a business case for it. He said Canada will position itself to be a supplier of energy to the world in a net-zero economy, meaning investments in hydrogen, critical minerals and a range of solutions.

Opportunities on the East Coast

In May 2022, Natural Resources Minister Jonathan Wilkinson said Canada was eyeing [accelerating the conversion](#) of an LNG import facility in New Brunswick that, if pursued by its private owners, could start supplying Europe within three years. Repsol SA is considering building a \$2 billion plant to export LNG, in response to the Russia situation.

In his August 23rd remarks, the Prime Minister stated:

“Conversion plants are usually placed close to the sources of LNG. And, as we look at the possibility of LNG plants on the east coast, able to ship directly to Germany, we find ourselves a long way from the gas fields in western Canada. It’s doable, we have infrastructure around that, but we’re looking very much at how we can best help.”

Political opposition to hydrocarbons in the province of Quebec has been cited as one reason why it may be problematic to export western Canada natural gas through the east coast.

Opportunities on the Raincoast

Many large-scale LNG export facilities [have been proposed](#) for the B.C. coast. Since 2010, the Canadian Energy Regulator (formerly the NEB) received 36 natural gas export license applications for B.C. projects. To date, LNG Canada is the only major LNG export project to begin construction. A number of small-scale operations are in operation or planned.

Efforts to construct facilities in B.C. have frequently encountered opposition from environmental groups and certain First Nations. For example, in 2016, Canada rejected plans for the Enbridge Northern Gateway project, a twin pipeline to transport bitumen from the Athabasca oil sands to a marine terminal in Kitimat. Major projects underway include:

1. *Northern GasLink* – during 2022, [work continued](#) on construction of the [Northern GasLink Pipeline](#), a TC Energy venture which will carry natural gas from Northeastern British Columbia to a conversion facility near Kitimat BC on the traditional territory of the Haisla Nation. The pipeline will have an initial capacity of 2.1 Bcf/d, with potential expansion to 5.0 Bcf/d. Construction is 72% complete, with a 2023 expected in-service date. The natural gas will be converted to liquid natural gas for export by LNG Canada, a joint-venture led by Shell. LNG Canada [reports](#) that work on the conversion facility is more than 60% complete.
2. *Trans Mountain* – during 2022, [work proceeded](#) on the Trans Mountain Expansion project, a pipeline that will carry crude and refined oil from Edmonton to Burnaby, B.C. Trans Mountain Corporation has been operated as a federal Crown corporation following its purchase from Kinder Morgan in 2018. The expansion project is planned for completion in late 2023.
3. *Treaty 8 Energy Corridor* – Treaty 8 leaders, who represent 40 First Nations in Alberta, Saskatchewan, British Columbia and the Northwest Territories, [have set a goal](#) to create an energy corridor for pipelines or rail lines, to ship oil and other materials from their region to the west coast. There have been talks with provincial and federal government ministers to establish a route.

Opportunities on Hudson Bay

Given the constraints on exports through the East and West coasts, some are now looking northward at the prospects of exporting energy through the port of Churchill, on Hudson Bay. The privately-owned port has previously been used to export grain during summer months.

During 2022, [ideas were put forward](#) to construct an oil, natural gas or hydrogen pipeline to Churchill, or to [use hydroelectricity](#) from Northern Manitoba to produce hydrogen for export through Churchill. Transportation specialist Barry Prentice [proposed](#) using the Hudson Bay Railway to carry containers of ammonia to Churchill for export.

In August 2022, the federal and Manitoba governments announced [\\$134 million in funding](#) to upgrade the Hudson Bay Rail line to Churchill, primarily to improve passenger traffic. The railway is owned by Artic Gateway Group, a consortium of 41 Indigenous communities.



Additional investment in the railway and port facilities would be required for a major energy venture. A new venture would also require consultation with affected Indigenous communities, and the specific configuration of facilities would have to be defined in order to pursue environmental approvals. In 2021, [an application](#) to create a “multi-use corridor” from the Alberta oilsands to Churchill that might move oil, natural gas, hydrogen blends or electricity, [was denied](#) by the government of Canada, in part due to “the lack of known development projects within the corridor to inform an impact assessment.”

In October 2022, the Premier of Alberta [wrote a letter](#) to her counterparts in Saskatchewan and Manitoba, inviting them to work together to expand the capacity of the Port of Churchill rail and port systems in order to export energy. The letter cites the urgency of the war in Ukraine and the interest of investors. In November, there were reported discussions among the three Premiers about transporting LNG to Churchill by rail.

The 2022 Roundup of Green Energy Projects and Programs across Western Canada

Manitoba

In February 2022, the Manitoba government announced a tax incentive for property owners who install green energy equipment. The suite of [tax incentives now available](#) is as follows:

▶ Manufacturer's tax credit:

- geothermal heat pump systems (7.5% of 125%)
- green energy transmission equipment (8% of 125%)

▶ Purchaser's tax credit:

- geothermal heat pump systems
- energy equipment (15%)
- heat pump (7.5%)
- solar heating (10%)
- gasification equipment (15%)
- energy co-generation equipment from biomass (15%).

In March, the seventh and final generating unit [went online](#) at the Keeyask generating station in Northern Manitoba. The 695 MW hydroelectric station is owned by the Keeyask Hydropower Limited Partnership, consisting of Manitoba Hydro, Tataskweyak Cree Nation, War Lake First Nation, York Factor First Nation and Fox Lake Cree Nation, acting through subsidiary/development corporations.

Efficiency Manitoba began offering rebates for installation of new solar photovoltaic systems. Rebates are available up to a maximum of \$5,000 for a home, and up to \$25,000 for a business. In October, Efficiency Manitoba [announced](#) two new rebate programs for renovation projects that substantially reduce energy use:

- *Home Deep Energy Retrofit Program* - provides rebates to homeowners of \$75 to \$150 per gigajoule saved as a result of a renovation (estimated \$10,000 - 15,000 for a typical project).
- *Commercial Deep Energy Retrofit Program* - provides rebates to businesses of up to \$12,000 for energy modelling and an incentive of up to \$6 per square foot for achieved energy savings (estimated \$240,000 - 600,000 for a typical project).

Permissible retrofits include major upgrades to insulation, air sealing, high-performance windows and doors, heating, ventilation, and air conditioning systems, and adding renewables. Rebates can be stacked with the Canada Greener Homes Grant, Canada Mortgage and Housing Corporation's Eco Plus program, and other sources of funding and financing for a retrofit project.

In November, the Manitoba government [announced](#) an 18-month pause on new connections of cryptocurrency operations to the electric grid, citing the large volume of power they require and small number of resulting jobs. The announcement mentions 17 recent connection requests that could consume up to 371 MW of power. 37 existing crypto operations in the province are not affected. Manitoba's low electricity rates are a draw for these operations. The pause was authorized by a Directive from the government to Manitoba Hydro approved by Order in Council No. 402/2022, under the authority of Section 13 of *The Crown Corporations Governance and Accountability Act*.

Saskatchewan

In June 2022, the Golden South Wind Energy project [went into service](#). The 200 MW wind farm, located near Assiniboia, was constructed by Potential Renewables in response to a request for proposals by SaskPower, at a cost of \$340 million. SaskPower has entered into a 20-year agreement with Potential to purchase the output of the wind farm.

Two other wind farm projects are currently in development:

- 200 MW Bekevar Wind Energy Project, a partnership between UK-based Renewable Energy Systems and the Cowessess First Nation. expected to be complete in 2023
- 200 MW Spring Lake Wind Project, expected to be complete in 2024

Two solar energy farms were completed during 2022, the 10 MW Pesâkâstêw Solar Energy Facility, and the 10 MW Awasis Solar Energy Facility. A third solar plant is [currently underway](#), the Foxtail Grove Solar Energy Facility, owned and operated by Kruger Energy Saskatchewan Solar. That is expected to be complete in 2023.

In August, SaskPower [announced](#) that it signed a 20-year agreement with the Southwest Power Pool (“SPP”). The parties will expand the transmission line capacity between Saskatchewan and the United States to enable the import and export of up to 650 MW of electricity between the two jurisdictions starting in 2027. SPP has 106 members across 14 states and manages the electric grid and wholesale power market for the central U.S. SaskPower will build the necessary transmission facilities in Saskatchewan, with SPP handling construction required in the U.S. Benefits include helping to manage the integration of more intermittent renewable power such as wind and solar, improved reliability in the event of planned or unplanned outages, and making it possible for Saskatchewan to export excess power into the pool. SaskPower [became a member](#) of SPP in October.

Alberta

In April 2022, the Canadian division of Pathfinder Clean Energy (PACE) [announced](#) it is relocating its headquarters from Vancouver to Calgary. The company has several solar projects in Alberta including the 61 MW Joffre solar project and the 10 MW Youngstown solar project.

In November, Air Products announced a blue hydrogen production facility to be constructed in Edmonton, at a cost of \$1.6 billion. The governments of Alberta and Canada [have committed](#) \$476 million toward the new facility. The plant is touted by the government of Alberta as an opportunity to make Edmonton the centre of Western Canada’s hydrogen economy. Canada calls the project the largest net-zero hydrogen production facility in the world.

November 18, 2022, was the [closing date for applications](#) for Alberta Innovates’ *Advancing Hydrogen Competition One*. Total funding of \$20 million is available, with individual grants up to \$2 million. Proposers were asked to demonstrate impacts on the development of Hydrogen in any of the following areas: Production; Transmission (storage, transportation, dispensing); Storage (mobile, surface, subsurface); End use (residential, commercial, industrial); and Export.

British Columbia

BC Hydro continued [construction](#) of the Site C Clean Energy Project, an 1,100 MW hydroelectric plant on the Peace River. 2022 activities included concrete placement for the powerhouse, intakes, penstocks and spillways, work on the approach channel, installation of steel piles in the tailrace and commencement of spillway gate and intake gate construction. Components and materials for three of the six turbines for the project have arrived at site for future installation. The plant is expected to be in service in 2024.

In February 2022, the BC Budget outlined three new green energy initiatives:

- [The Clean Buildings Tax Credit](#) is a refundable tax credit for qualifying retrofits that improve the energy efficiency of commercial and multi-unit residential buildings with four or more units. The retrofit must improve the energy efficiency of an eligible building and meet energy-use targets. The credit amount is 5% of qualifying expenditures paid on the retrofit. All work must be certified with the Minister of Finance.
- Heat pumps [were exempted](#) from PST. PST on fossil fuel combustion systems that heat or cool buildings or water was increased to 12%.
- Used zero-emission vehicles [were exempted](#) from PST. The threshold for the province's vehicle surtax was increased from \$55,000 to \$75,000 for zero-emission vehicles.

In June, the town of Lytton, B.C. [announced](#) a memorandum of understanding with Solar Earth Technologies to install their unique, solar sidewalk panels. The hardened panels can be installed on the ground and fitted to sidewalks, trails, driveways and parking lots. According to the manufacturer, the panels can withstand the weight of a five-ton vehicle or a stomping elephant, are skid-proof and non-slip and can operate between -40°C and 90°C. The panels would be sufficient to supply the community with energy for up to five sunless days, after which a backup supply such as the grid is needed. Lytton, which was ravaged by fire in 2021, is receiving government funds to rebuild essential infrastructure and is seeking a net zero solution.

In July, FortisBC, Hazer Group and Suncor [announced](#) plans for a **turquoise hydrogen** production plant in Port Moody, B.C. The pilot project will be small scale at first, but could be scaled up to produce up to 2,500 tonnes of hydrogen fuel a year. No GHG's are created during the production of green hydrogen, while in the production of blue hydrogen from fossil fuels some but not all carbon emissions are captured and converted. The proponents say that their Turquoise hydrogen technique is: "an almost zero-emission method for capturing and converting methane from burning natural gas." Using a method called **methane pyrolysis**, the Fort Moody plant will separate carbon from hydrogen in the methane released when natural gas is burned. The hydrogen can be used as energy, while the carbon is stored as solid graphite which can be used in other industries like construction.

During the Autumn, [parties filed](#) Final Arguments with the BC Utilities Commission in the review of FortisBC's application for the Advanced Metering Initiative. FortisBC plans to replace the meters of all natural gas customers served by the utility. It says the project is needed to address the challenges with contracting for manual meter reading services, will enhance system resiliency, and will allow customers to access their hourly consumption.

In September, Hydra Energy [announced](#) it was breaking ground on the world's largest hydrogen refueling station in Prince George, B.C., which will reduce GHGs from the heavy trucking industry. The station's low-carbon hydrogen is being produced from two on-site, 5 MW electrolyzers with electricity from the BC Hydro grid. The station will produce 3,250 kilograms of hydrogen a day. Hydra has offered truckers a no-cost conversion kit for heavy duty trucks to operate either on diesel or hydrogen. Hydra says up to 24 converted trucks an hour will be able to refuel hydrogen across four bays, as quickly as diesel. Both hydrogen and diesel will be supplied at the same location, allowing drivers to switch as conditions warrant. The station is planned to be operational in 2024.

In December, an 18-month moratorium on connections of cryptocurrency operations to the electrical grid was announced by the government of British Columbia (similar to the moratorium announced by Manitoba, above). The moratorium was authorized by a Directive by the government to the BC Utilities Commission approved by Order in Council No. 692/2022, and by BCUC Order No. G-390-22A.

Greenwashing Enforcement: How Can General Counsel, Senior Leaders and Boards of Directors Mitigate the New Legal Risks?

Companies that make overly optimistic claims about their sustainable performance are facing mounting enforcement actions and litigation. A major “greenwashing” investigation is now underway in Canada, part of a wave of actions worldwide taking aim at company materials and websites that are **“overly promotional.”**

What can general counsel, senior leaders and boards of directors do to mitigate these new legal risks?

Financial Repercussions

Most Canadian firms today appreciate the importance of justifying their environmental, social and governance performance (“ESG”) to their customers, boards of directors and other stakeholders. This is commonly seen in sustainability reports, net zero targets and other investor and website materials. Climate-related disclosures will soon be mandatory for financial institutions and public companies.

Disclosure comes with a risk: overly optimistic descriptions of a company’s sustainability performance can bring accusations that it is **greenwashing**. That can undermine efforts to connect with customers and can financial repercussions. As an illustration, in February 2022, Morningstar Inc., an influential data provider, removed more than 1,200 investment funds with a combined \$1.4 trillion in assets from its European Sustainable List after an extensive review of prospectuses and annual reports provided to investors uncovered ambiguous language.

Increasingly, greenwashing is also a legal risk.

Complaint to the Competition Bureau

In October 2022, Canada’s Competition Bureau confirmed [it is investigating](#) a complaint against Canada’s largest bank that consumers were being misled about the bank’s climate performance.

The complaint alleges the bank made “materially false” claims about its commitments to the Paris Agreement Goals and achieving net zero by providing more than US\$201 billion in financing and underwriting to fossil fuel companies from 2016 through 2021. The complaint alleges the bank failed to put forward a credible net-zero plan despite making a net-zero pledge in 2021, and a commitment to provide \$500 billion in sustainable financing is questioned on the basis that the bank’s definition of “sustainable financing” isn’t linked to greenhouse gas emissions.

The bank denies any claims of greenwashing. In a statement, a spokesperson for the bank said it “strongly disagrees with the allegations in the complaint, and believes the complaint to be unfounded and not in line with Canada’s climate plan.”



Increasingly, greenwashing is also a legal risk



The Gathering Storm

Globally, more than 1,800 ESG-related litigation claims have been filed, and that number is expected to increase exponentially over the next few years as a result of more jurisdictions adopting mandatory ESG disclosure requirements. Litigants include disaffected shareholders, NGO's and government authorities.

The U.S. Securities and Exchange Commission has begun aggressively pursuing charges and enforcement against companies and investment advisers for misleading ESG disclosure.

Earlier this year, German police raided the offices of Deutsche Bank, and H&M was forced to backpedal on its sustainability claims.

In October, the UK's Advertising Standards Authority ordered HSBC to remove bus stop ads in London and Bristol about the bank's sustainability commitments.

The Authority received 45 complaints claiming the ads misled consumers. The ruling noted: "HSBC was continuing to significantly finance investments in businesses and industries that emitted notable levels of carbon dioxide and other greenhouse gasses."

That same month, the Australian Securities and Investments Commission levied fines of \$53,280 on Tlou Energy for a series of disclosures touting its clean energy program. The commission said:

"[the commission] was concerned that Tlou either did not have a reasonable basis to make the representations, or that the representations were factually incorrect,"

In [one example](#), Tlou filed with the commission a colorful diagram that illustrated the use of carbon sequestration at its Lesedi power station. The commission said the diagram conveyed that the plant would be largely carbon neutral, but found that Tlou had failed to do modeling, studies or investigations to confirm that this would be the case. Accordingly, the commission ruled that Tlou had made "false or misleading representations with respect to the standard, quality, value or grade of services." ***Many Canadian energy companies take a similar approach, using sequestration and other carbon reduction measures to balance their carbon emitting activities and achieve net zero.*** The problem isn't sequestration, it is disclosures about sequestration that lack adequate support.

Guidance from Securities Administrators

In November, Canadian Securities Administrators ("CSA") released guidance on sustainability claims. The biennial report on its Continuous Disclosure Review Program highlights common disclosure deficiencies among public issuers - including a growing problem with "overly promotional" ESG disclosure. The report says;

"We have observed an increase in issuers making potentially misleading, unsubstantiated or otherwise incomplete claims about business operations or the sustainability of a product or service being offered, conveying a false impression commonly referred to as 'greenwashing.'"

THE CSA REPORT SAYS:



“When describing current and proposed ESG-related activities, issuers should avoid misleading promotional language.

With increased access to data and information online, it is important to ensure that all public disclosures, whether voluntary or required, are factual and balanced.”

To illustrate what not to do, the CSA report highlighted a press release from a public company which contained the following problems:

- the company claimed it would be carbon-neutral by the year 2023, without explaining how that milestone would be reached
- the company claimed it had a “strategic relationship” with “high-quality partners attentive to environmental stewardship” and a key partner with “aggressive emissions reduction targets,” without offering any further details or support for those claims
- the company described itself as a “global leader in environmental solutions,” despite generating only nominal revenue from its operations
- the company claimed it had relationships with various organizations dedicated to promoting sustainable communities, educational opportunities and employee engagement – all without identifying the organizations or describing what they actually do
- the company claimed it had a “high rating” on a national corporate governance survey but did not disclose its rating or the criteria used to determine the rating

An ESG Legal Risk Assessment

Given the mounting legal risks in this area, it’s timely for Canadian companies to seek legal review of their ESG disclosures, such as their sustainability reports, emission goals, and investor and website materials. Doing an **ESG Legal Risk Assessment** can be a good first step.

Even companies in high-emitting sectors can still be viewed as an attractive investment by many institutional investors if they have credible sustainability reporting and net zero plans, as well as meaningful targets for reducing emissions. The public disclosure of these plans and targets needs to be factual, supported and balanced.

An ESG Legal Risk Assessment

An ESG Legal Risk Assessment typically consists of the following steps:

- Review of a company's ESG disclosures, such as sustainability reports, net zero goals, investor and website materials;
- analysis of disclosure-specific legal risks;
- use of advanced data and analytics;
- analysis of the company's broader ESG landscape and legal risks including:
 - Prior, current and predicted ESG litigation
 - Shareholder ESG activism, resolutions and trends
 - Peer and competitor ESG reporting
 - Investor and lender ESG expectations and requirements
 - Media and stakeholder attention and concerns
 - Environmental, health and safety, financial and securities regulatory compliance; and
- recommended opportunities for improvement.

WE CAN HELP

The MLT Aikins ESG team has hands-on experience building ESG strategies in the energy, mining, nuclear and agriculture sectors, some of the most heavily scrutinized industries from an ESG perspective. Our team has specific ESG legal and technical training, in-house experience and a deep focus on environmental, social, governance and Indigenous matters. To contact the ESG team [click here](#).



Indigenous-Led Energy Projects Hit the Mainstream

Indigenous communities are leading a growing number of major renewable energy projects in Western Canada, as individual communities and organizations strive to supply their own energy needs and become players in the energy industry.

Fort Nelson First Nation

During 2022, the early stages of development took place on the Fort Nelson First Nation's Tu Deh-Kah Geothermal project. The project will repurpose the Clarke Lake gas field in Northern B.C. into one of Canada's first commercially viable geothermal electricity and heat production facilities, with a [goal](#) of producing 7-15 MW of electricity. The First Nation's economic development corporation, Deh Tai LP owns the project. In January, the Nation received \$100,000 in [funding](#) from the B.C. government to carry out sub-surface resource and surface facilities engineer design work.

Salteau First Nation, Doig River First Nation, Wet'suwet'en Nation

In 2022, three First Nations in Northern B.C. undertook solar energy projects. The Sauteau First Nation and the Doig River First Nation will each expand their solar capacity by installing 25-35 small-scale residential solar photovoltaic systems on their reserve lands, prioritizing vulnerable and low-income community members, to advance energy self-sufficiency and reduce energy bills. The Wet'suwet'en Nation is undertaking community solar installation and related training. In January, 2022, it was announced that each of the three projects will receive B.C. government funding of \$150,000 from the [First Nation Clean Energy Fund](#) and federal funding under the Greener Homes Grant Program. A spokesman for the Doig River First Nation [said](#): "This will allow us to take the next steps toward an ultimate goal of power independence."

B.C. First Nations Power Authority

[Reports in April 2022](#) indicate that several communities have been in discussions to create a First Nations Power Authority for B.C., which would serve as a power utility enabling First Nations to generate and sell electricity to one another and to others. The Authority would advocate with the B.C. government to amend the *Utilities Commission Act* to allow the following:

- Allocate to First Nations the responsibility for supplying half of the gap in generating capacity which they say exists in B.C. According to the Pembina Institute, this gap exists as a result of B.C. Hydro underestimating the amount of power that will be required for B.C. to meet its climate goals. Proponents say this will lead to 600 long-term jobs in communities and \$8.25 billion in investment in renewables.
- Allow First Nations to use BC Hydro power lines at a negotiated cost to sell their renewable power to other First Nations and to industrial customers in B.C.

Athabasca Indigenous Investments

In September, Athabasca Indigenous Investments [acquired](#) an 11.57% equity interest in seven Enbridge pipeline assets, at a cost of \$1.12 billion. Athabasca Indigenous Investments is a partnership of 23 Treaty 6 and Treaty 8 First Nations and Métis communities, located in northern Alberta. The assets acquired include the Athabasca Pipeline; Athabasca Twin and Wood Buffalo Extension Pipelines and associated tankage; Norlite Diluent Pipeline; Waupisoo Pipeline; Wood Buffalo Pipeline; Woodland Pipeline and Woodland Extension Pipeline. The assets are underpinned by long-life resources and long-term contracts, which provide highly predictable cash flows. The Alberta Indigenous Opportunities Corporation provided loan guarantees to assist in the transaction's financing.

Peter Ballantyne Group of Companies

Mee-Toos Forest Products Ltd., a subsidiary of the Peter Ballantyne Group of Companies, is [undertaking](#) a project to replace the propane heating systems with biofuels at two schools, in Pelican Narrows and Deschambault Lake. The project is expected to reduce fossil fuel usage by 90%. The [federal government announced](#) it will provide \$2 million of funding.

Meadow Lake Tribal Council

In July, the Meadow Lake Tribal Council announced plans to develop a regional approach to renewable energy, energy-efficient, and conservation capacity building that is led by the Indigenous communities for Indigenous communities. The Tribal Council represents nine First Nation members in Saskatchewan. The Tribal Council also announced its plans for an 816 kW solar farm in Southern Saskatchewan. The Council plans to use it as a stepping stone to create other renewable energy projects. [The federal government has committed](#) \$4.3 million and \$1.6 million in funding to the two projects.

Saskatchewan First Nations Power Authority

In July, the First Nations Power Authority of Saskatchewan announced a capacity-building project focused on Community Energy Planning for Saskatchewan Indigenous communities that currently do not receive natural gas service from SaskEnergy. Canada [has committed](#) \$975,000 to support the project.

George Gordon First Nation and Star Blanket Cree Nation

The Pesâkâstêw Solar Energy Facility [was officially opened](#) in July. The 10 MW solar farm is owned and operated by Pesâkâstêw Solar Limited Partnership, a partnership between George Gordon Development Ltd., the economic development arm of George Gordon First Nation, Red Dog Holdings Ltd., the economic development corporation of Star Blanket Cree Nation and Natural Forces, a private independent power producer. The power generated will be sold to SaskPower pursuant to a 20-year Power Purchase Agreement.

Cowessess First Nation

The \$21-million Awasis solar project [officially opened in November](#). The 10 MW solar farm is located on Cowessess First Nation reserve land about three kilometres southeast of Regina. The project is owned and operated by a limited partnership called Awasis Solar Ltd. that is 51% owned by Awasis Nehiyawewini Energy Development (ANEDC), the economic development corporation which oversees the business assets of the Cowessess First Nation, and 49% by Elemental Energy. The output of the plant will be sold to SaskPower pursuant to a 20-year Power Purchase Agreement.

ANEDC is also partnering with Renewable Energy Systems Canada in the [construction](#) of the 200 MW Bekevar wind farm. Construction of that plant is underway with a scheduled completion in 2023. The output will be sold to SaskPower pursuant to a 25-year Power Purchase Agreement.

Indigenous Carbon Tax Refunds

Environment and Climate Change Canada [says](#) it working with Indigenous partners in Alberta, Manitoba and Saskatchewan to co-develop solutions for returning 1% of the proceeds collected from the federal fuel tax in those provinces for the period 2020-21 to 2022-23. The proceeds will be returned once co-development activities have concluded. The fuel tax is collected pursuant to the *Greenhouse Gas Pollution Pricing Act* in provinces that have not developed carbon regimes which meet federal standards.

Saskatchewan First Nations Natural Resource Centre of Excellence

In December, the Saskatchewan First Nations Natural Resource Centre of Excellence signed a [Memorandum of Understanding](#) with the Canada Energy Regulator. The [Centre of Excellence](#) is a creation of the Lands and Resources Commission of the Federation of Saskatchewan Indian Nations, and is mandated to provide support and work with First Nation communities in creating opportunities for the innovative, sustainable and environmentally responsible development of the natural resources within their lands and Indigenous territories.

The MOU is intended to create opportunities for cooperation and collaboration to develop CER energy information products informed by Indigenous knowledge and expertise. This includes the co-development of an energy data project which will share data and information on energy production on Saskatchewan Treaty lands to help inform conversations about natural resource development. A CER spokesman said:

“It is through valuable, collaborative initiatives such as this that we gain a deeper understanding of perspectives and approaches to important data sets. It also allows First Nations people to play a meaningful role in not only educating and understanding but also in the planning and development of critical infrastructure in our Treaty Territories throughout Prairie Canada.”

Kivalliq Region of Nunavit

Led by Nukik Corporation, the Kivalliq Hydro-Fibre Link aims to bring clean energy and broadband service to the Kivalliq region of Nunavut. A new 1,200 kilometre overhead electric transmission line will be constructed between the Gillam, Manitoba area and the Kivalliq region that will help five communities and two gold mines transition away from their diesel-based electrical supply. The project will also deliver broadband service for 10,000 residents. In November, Canada [committed](#) \$7 million to support the project.

Red River Métis

In December, Canada [announced](#) \$1.4 million in funding to the Manitoba Métis Federation for the training of energy advisers from under-represented groups such as the Red River Métis within the province of Manitoba. The aim is to enable a greater number of homeowners to retrofit their homes pursuant to the Canada Greener Homes initiative.

St. Theresa Point First Nation

The St. Theresa Point First Nation is installing a solar power system for the community's school. The community in North-Central Manitoba anticipates savings of \$50-75,000 per year from its utility bills. In December Canada [announced](#) \$1.5 million funding to support the project, from the Green and Inclusive Community Buildings program.

An Interview with Tricia Thomas

Tricia Thomas (Laxelewetsnaat) is an Indigenous entrepreneur, facilitator, speaker and a proud member of Halalt First Nation on Vancouver Island. She started her company, Salish Eye Productions, in 2014 with the mission to create positive change for Indigenous People and build cross-cultural relationships through photo, video, design and communications. Tricia has an MBA in Sustainable Innovation from the University of Victoria (Gustavson School of Business) with a focus on cultivating Indigenous sovereignty through solar energy. She is now an instructor at the university teaching Indigenous community collaboration and business. Tricia also serves as an Indigenous Relations Consultant with organizations wanting to build meaningful relationships with the First Nations in whose territories they live and work.



Q: *What kinds of Indigenous energy projects are you seeing?*

A: First Nations are seeking a brighter future for the next generations, for our children, for wildlife and for our traditional livelihoods. There needs to be a door created by going into communities to develop relationships, to move forward and get these projects built to Indigenous standards. In addition to funding, a lot of things will need to be changed for that to happen.

Wind and solar power are very important energy sources. The Sauteau and West Moberly Lake First Nation partnered with Natural Forces to develop BC's largest Indigenous-owned wind farm. Haida Gwaii is eliminating diesel reliance by building solar panel farms and trying to find ways to utilize tidal, wind, biomass and run-of-river energy. There's a diversity of energy sources that need to be used. Nisga'a territory uses geothermal and Hupacasath uses run-of-river hydroelectricity. Meadow Lake Tribal Council recently opened a biomass facility in Saskatchewan. Hydrogen will be coming up in specific projects.

I think it's important for us to start with off-grid communities, which are dependent on diesel fuels for their electricity. Diesel is toxic and dangerous, and has resulted in several social, environmental and economic

sustainability concerns. I've heard stories about some communities getting off diesel and then hearing birds again. The wildlife came back to the community. You don't realize how the sound of the diesel generators impacts nature and impacts our own health and well-being.

Q: What contributes to a successful Indigenous energy project?

A: Part of it depends on the geographic location. I'm located on Vancouver Island, and one of the big projects still talked about today is the T'Sou-ke Nation's solar energy project. I've been up to the northern region where there are high winds, and saw the Sukunka Wind and Zonnebeke Wind projects near Chetwynd. It also depends on the opportunities the Nation is looking forward to. Many Indigenous leaders are mandated by their communities on how to go forward. There's a lot of education that needs to happen around energy too. What is energy, different types of non-renewables and renewables, and so on, so that we can make informed decisions moving forward. The communities that have an interest in renewable energy need to be supported, because not everybody has the capacity or the administration to be able to implement these projects.

We need champions in the community, to support energy projects. Champions that are connected to the community, that work in alignment with community directions, and not outsiders who have a different agenda. The movement towards Indigenous economic sovereignty has attracted self-serving people into the communities and some have a different agenda than the communities do. So we have to be mindful of that as well.

Q: What can governments and business partners do better?

A: We've reached a point where we need to manage our natural resources. We've always done it, but we need to because not everybody is on the same page about only using what you need. That's something that I was taught growing up is take what you need, leave the rest. There needs to be more action in B.C. to move towards cleaner energy. There are capacity issues, funding issues and relationship issues. All of

these things are obstacles for industry, government and nations to overcome. Relationships need to be built and strengthened, and restrictive government policies need to be changed to allow that door to the Indigenous to be created. The Canadian government has supported non-renewables for decades.

Applying a lens through the United Nations Declaration on the Rights of Indigenous Peoples, UN Sustainable Development Goals, Truth and Reconciliation calls to action and OCAP Principles can guide the relationship with Indigenous Peoples so we can move forward, together. I'd also like to see the elimination of administrative burdens, and improved access to capital and federal procurement opportunities that enable Indigenous communities to participate in larger projects, and provide equitable participation for the communities.

We need more renewable energy financial investments. We have an opportunity with the push for clean energy and climate change, to move forward towards energy security. We need to be able to work together to attract investment. Right now there's a strong emphasis on Indigenous partnerships. Any project would benefit from that approach, from a business perspective. As a company, if you combine Free, Prior and Informed Consent with ESG, then you have a better chance for project success. Businesses also have an ethical responsibility. A lot of companies now have a Reconciliation Action Plan to support their business with Indigenous communities. We need to get to know each other. Companies need to be looking at the TRC calls to action and aligning their organizations with Indigenous standards. An important element is shared decision-making, starting from the planning stage, not when a project is shovel-ready. That's going to improve success factors with Indigenous people with rights and title to lands and resources.

Improving these relationships is good for the economy as a whole. Sometimes industry is afraid to share the pie, or there is no relationship. We need to have those difficult conversations to be able to move forward on the same page. We all want the same thing, so there needs to be meaningful collaboration between all parties.

An Interview with Justin Bourque

Justin Bourque is the President of Athabasca Indigenous Investments, a partnership of 23 First Nation and Metis communities which in 2022 purchased seven pipeline assets from Enbridge. In 2021, Justin was named one of Canada's Top 20 Dynamic CEOs and in 2022 one of the 10 Most Innovative Business Leaders to Follow. He was the recipient of the JA Northern Alberta Business hall of fame innovator award. Justin was born and raised in the community of Anzac, Alberta, to a family with a proud, traditional Metis heritage. He is the third generation owner of the family trapline.

Q: Tell us a little about yourself

A: I reside out on the trapline as much as possible where I live a sustainable lifestyle. I'm as off-grid as I can be, with solar powering my cabin, and my only fuel reliance is a propane tank to keep the cabin warm when I'm not there. That's how I was raised and I try to teach my kids that way. I started at the young age of 16 in the oil sands industry as a welding apprentice. I worked myself up through various roles into leadership, project maintenance and turnaround management roles. While working for one of the producers, I found myself dealing with a number of complex and challenging situations. Eventually I landed working for my community, Willow Lake Metis. It was a good fit for me, making use of my experiences with producers and businesses, and being able to promote my community at the same time.



Q: Do Indigenous communities have a role in Canada's energy future?

A: Absolutely. Indigenous communities can and should have a significant role in Canada's energy future. That is essential if we believe there is a future for Canada's energy industry.

But do we really understand why? That is one of the big questions that I have.

The first thing that everyone likes to say is economic reconciliation. And yes, that's definitely a big part of the why. But I believe it's more than that. There's a larger piece of the puzzle where Indigenous communities are more the solution than an end in Canada's energy future.

Sustainability is now a key driver in the business world. The three pillars are environment, social and governance. A business must ensure ROI is maintained, but in a way that is sustainable and weighing the environmental impacts, the social responsibility and strength in governance and integrity. It is within this framework that Indigenous communities have a unique and dynamic opportunity to thrive. I see ESG as a mirror of Indigenous beliefs and values. I believe that understanding how communities can operate within these pillars is critical to Canada's energy future.

Inclusion in resource development, and replication of Indigenous partnerships created to date, are just the beginning. More inclusion in developments will begin to elevate communities and increase their capacities to do more, invest more. If done right, it will help the carbon transition through green projects, carbon credits and offsets, or ownership of critical infrastructure.

Indigenous partnership is not just about one party. Partnership provides a value chain for those involved. Industries need Indigenous support and involvement to maintain their business relevance. Indigenous communities need partnerships to build capacity and to have the ability to influence developments in a positive and sustainable way. Government needs partnerships not only as a means for reconciliation, but as a key lever to boost economies throughout our country, to localize its investment and to strengthen Indigenous communities.

Indigenous communities don't just have a future, I think they are the future of energy development.

Q: *What has worked well on Indigenous-led energy projects that you've seen, and what can governments and business partners do better?*

A: Transparency is one key piece. Indigenous communities don't respond well to feeling like there's more than meets the eye. Meaningful engagement is critical from the value perspective of Indigenous communities. I don't think it's specific to Indigenous, business in general seeks true partners. Indigenous communities historically feel lied to from industry and government. Through meaningful engagement we can begin to build a foundation for a collective way forward.

Government and industry are both typically comfortable in negotiating and they do negotiating quite well. I would say partnership with Indigenous communities is less about negotiating and more about understanding. We are on a road to reconciliation. It's important to engage with communities from an understanding perspective.

We also need to find ways for collaboration across industries. Industries are looking at ways to improve, to decarbonize, increase their viability through sustainability and overall, maintain their societal relevance going forward. In the energy field, the industry has a growing desire to include Indigenous partnerships. I believe there's a future for Indigenous inclusion across all businesses.

Q: *Tell us about the Enbridge purchase*

A: It's the largest transaction to date for Indigenous inclusion in the energy industry. It was a purchase of an interest in critical infrastructure throughout the oil sands region. It is very pivotal in terms of where we're going for Indigenous inclusion in the energy sector. I shared with you that I live on my trapline. One of those transmission lines that we just acquired, I just have to go on my tippy toes on my deck and I can see the right of way where that passes.

The 23 Indigenous communities involved have always been connected whether it be through kin or historical relations. For the first time we're connected physically with a pipe in the ground that passes through each of our traditional territories. And for the first time we benefit from the resource that is extracted from our traditional territory and transported through it.

The transaction means a great deal not just for the communities but also for Alberta and Canada at large. It's a direct injection to the economy. The returns would once go to a shareholder or investor who might not even live in Canada. Those returns are now injected directly into communities' economies, and from there will ripple across Alberta.

If we look at it through an ESG mindset, if we look at it through mandatory reporting requirements and if we look at it from a carbon footprint, communities now have a role to play in decarbonization in general. They are a critical aspect of it, now as partners and owners.

We need to spend more time helping communities understand what it means to be equity owners and how to structure themselves in a way that they can thrive in the ESG framework. We're going to miss the boat if all we do is just continue to invite Indigenous communities to equity ownership deals and not really build that understanding. How do you be a partner? How do partners create a value chain for each other? How do we now leverage that value chain and how do communities now become part of the solution? These are all passionate topics of mine.

Emissions Reduction in the 2022 Federal Budget

In April 2022 the Government of Canada tabled Budget 2022, providing details on a number of measures proposed in the 2030 Emissions Reduction Plan. The provisions could have wide-ranging impacts on businesses in Western Canada, from companies in the oil and gas sector to heavy industry, agriculture and transportation.

Big Emitters Could Benefit from CCUS Tax Break

One of the government's key strategies for reducing industrial emissions is carbon capture, utilization and storage ("CCUS") technology. CCUS, which has been successfully deployed in Alberta and Saskatchewan, captures CO₂ before it enters the atmosphere or removes it directly from the atmosphere and either stores the gas underground or uses it as an input in applications such as enhanced oil recovery projects.

In Budget 2022, Canada announced a **refundable investment tax credit** for businesses that incur eligible CCUS expenses. Notably, enhanced oil recovery projects are not eligible for the tax credit, but projects that store CO₂ underground or in concrete are eligible. Businesses will receive tax credit rates of:

- 60% for investments in equipment to capture CO₂ from the air
- 50% for investments in equipment to capture CO₂ from other sources
- 5% for investments in equipment to transport, store and use CO₂

These tax credits will be available for the 2022 tax year. To incentivize businesses to act quickly, the government said it would reduce the tax credit rates by 50% for the period from 2031 through 2040.

Canada is also promising to invest \$194 million to expand the Industrial Energy Management System to support ISO 50001 certification, energy managers, cohort-based training, audits and energy efficiency-focused retrofits for key small-to-moderate projects.

Mandatory Climate Disclosure Coming for Banks

The budget outlines government plans to require federally regulated financial institutions to begin reporting on climate-related financial risks in accordance with the Task Force on Climate-related Financial Disclosures ("TCFD") framework.

Beginning this year, the Office of the Superintendent of Financial Institutions will consult with banks and other federally regulated financial institutions on climate disclosure guidelines that adhere to the TCFD framework. The goal is to gradually phase in reporting requirements for financial institutions beginning in 2024. Banks and other financial institutions will also be expected to collect climate risks and emissions from their clients. [Learn more about mandatory climate disclosure.](#)

The government said it plans to require federally-regulated pension plans to disclose the environmental, social and corporate governance considerations they use in their portfolio construction, including climate-related risks. Canada will also call on the Sustainable Finance Action Council (25 of Canada's largest financial institutions and pension funds) to begin reporting on strategies for aligning private sector capital with the transition to net zero.

It is anticipated that these measures will lead to increased climate-related disclosure requirements and scrutiny for individual businesses who are seeking financing.

Increased Investment in Clean Agriculture

Budget 2022 included a \$470-million investment in the Agricultural Climate Solutions: On-Farm Climate Action Fund to help farmers adopt sustainable practices such as rotational grazing, fertilizer management and cover crops.

The government will invest \$330 million in the Agricultural Clean Technology Program to help farmers buy more energy-efficient equipment. The federal government will spend \$100 million to support post-secondary research into developing technologies and crop varieties that will allow for net-zero agriculture.

The budget also includes \$150 million for a “resilient agricultural landscape program” to address carbon sequestration, adaptation and other environmental co-benefits with the provinces and territories.

Support for Renewable Energy Projects

The government will ramp up support for renewable energy projects with an additional \$600 million in funding for the Smart Renewables and Electrification Pathways Program, which supports renewable electricity and grid modernization projects. Canada has also earmarked \$250 million to support the predevelopment of large clean electricity projects with national significance, such as inter-provincial electricity transmission projects and small modular reactors (“SMRs”).

Additional support for SMRs will come from \$69.9 million in funding to minimize the waste generated by reactors, support the creation of a fuel supply chain and bolster international nuclear cooperation agreements. A further \$50.7 million will be allocated to the Canadian Nuclear Safety Commission to develop SMR regulations in harmony with global regulations.

The government is promising a \$2.2-billion renewal in the Low Carbon Economy Fund, which has funded wind and solar power, as well as electric heating in buildings, in communities across Canada. Canada will allocate \$32.2 million to the Low Carbon Economy Fund to support the development of the Atlin Hydro Expansion project in British Columbia, which will provide clean electricity to the Yukon.

Transforming Transportation

Canada has ambitious goals to reduce transportation emissions, including mandating that 100% of all light-duty vehicle sales and 35% of all medium and heavy-duty vehicle sales be zero-emission vehicles by the year 2035.

In Budget 2022, the government promised \$1.7 billion in funding for the Incentives for Zero-Emission Vehicles (“iZEV”) Program, which offers purchase incentives of up to \$5,000. Eligibility will also be expanded to include more vehicles.

The budget also includes \$400 million in new spending on charging stations, and an additional \$500 million for the Canada Infrastructure Bank to develop large-scale charging and fueling stations to generate revenue in the public interest.

\$547.5 million will go toward fund incentives for medium and heavy duty vehicle purchases. \$199.6 million is directed to retrofit large trucks currently on the road, \$2.2 million to support Greening Government fleet electrification commitments and \$33.8 million for demonstration projects for long-haul, zero-emission trucks.



Critical Minerals

In December, the federal government released [Canada's Critical Minerals Strategy](#) (the "Strategy"). The Strategy cites \$3.8 billion of funding from Budget 2022, including \$79.2 million for public geoscience and exploration, a 30% Critical Mineral Exploration Tax Credit and \$1.5 billion for the Strategic Innovation Fund to support critical minerals projects, with prioritization to advanced manufacturing, processing, and recycling applications.

[The Critical Minerals List](#) identifies 31 minerals and metals considered essential for the sustainable economic success of Canada and its trading partners. Many minerals are critical to the energy field such as lithium (energy storage batteries) and palladium (hydrogen fuel cells).

The Strategy identifies three supply chains using critical minerals that have the highest potential value to be **nationally integrated** (produced in Canada rather than natural resources exported):

- Clean technologies, which include zero-emission vehicles, wind turbines, solar panels, advanced batteries, hydrogen fuel cells, small modular reactors;
- Information and communication technologies, including semiconductors;
- Advanced manufacturing inputs and materials, such as defence applications, permanent magnets, ceramics, high value-added metals, electronic materials, composites, polymers, and biomaterials

The 2030 Emissions Reduction Plan

In March 2022, the Government of Canada released the "*2030 Emissions Reduction Plan: Canada's Next Steps to Clean Air and a Strong Economy*" (the "2030 Plan") - the first Emissions Reduction Plan issued under the *Canadian Net-Zero Emissions Accountability Act* (the "Act").

The *Act* provides a framework for Canada to achieve net-zero greenhouse gas emissions by 2050. The *Act* requires the Minister of Environment to set national greenhouse gas emissions targets and emissions reductions plan to achieve those targets for 2030, 2035, 2040 and 2045.

The 2030 Plan is the first Emissions Reduction Plan. It sets a target of cutting greenhouse gas emissions by 40-45% below 2005 levels by 2030. The *Act* provides that, in coming years, the government must assess its progress under the plan and develop subsequent targets and plans.

Some of the key features of the 2030 Plan include:

- Making it easier for Canadians to switch to electric vehicles
- Promoting clean energy infrastructure investments
- Developing a carbon capture, utilization and storage strategy
- Exploring measures to guarantee the price of pollution

Building a Green Prairie Economy Act

In December, the [Building a Green Prairie Economy Act](#) (Bill C-235) received approval in the Senate. Section 3 of the Act requires the Minister for Prairies Economic Development Canada to do the following:

"... develop a framework to coordinate local cooperation and engagement in the implementation of federal programs across various sectors, with the objective of building a green economy in the Prairie provinces"

The framework must include measures to promote economic sustainability, growth and employment in the Prairie provinces, including solar energy projects and projects that make use of all sources of energy including nuclear, and development of green energy in agriculture, forestry, transportation, manufacturing and tourism. The minister must provide regular progress reports on the framework to Parliament.

Green Energy - Meet Infrastructure Planning

Your company has committed to an exciting project to install green energy! You will supercharge your public image, become net zero by 2050 and blow past your internal ESG targets.

How will you make the leap from great expectations to a successful project?

This is no longer a debate about the Paris Climate Accords, you are now ears-deep in an infrastructure project. There's no need to panic. The smart move is to engage a strategic partner who can assist you at every stage of the project, working under the direction of your project management team.

A successful project looks like this:

- Well planned, well designed, well built
- Completed on time and on budget
- Disputes with contractors, suppliers and consultants prevented or resolved early
- An accident-free construction site
- Risks managed effectively from day one

However, a successful infrastructure and energy project does not happen by accident. It is the product of early identification and management of risk as part of an overall project strategy for procurement and contracts that should stretch from first concept drawing to close-out of the warranty period.

Below is a brief checklist of items to consider with the help of your legal team/strategic partner.

PRE-PROJECT PREPARATION & SUPPORT

Hiring Consultants

- Evaluating the commercial issues and risks when engaging project managers and design consultants
- Developing effective requests for proposals
- Preparing and negotiating well-designed consultant contracts

Evaluating Project Delivery Strategies

- Selecting and adapting the best model for your project that will appropriately balance cost, schedule and performance risks, while ensuring that the chosen project delivery model balances funding and operational considerations

Managing Procurement

- Selecting and developing a procurement strategy that aligns with the project delivery schedule
- Designing and implementing effective procurement processes
- Structuring effective submission requirements and evaluation criteria aligned with your project and contract needs
- Advising you on unexpected procurement issues

Evaluating and Developing Project Construction Contracts

- Assessing contract options and customizing the contract to fit your project
- Creating options for assigning and managing project risks and developing contracts that match the project risk allocation
- Explaining complex clauses and solving troublesome negotiating positions
- Negotiating your construction contracts
- Ensuring all your contracts with contractors, consultants and suppliers are co-ordinated and aligned



Intellectual Property

- Securing the necessary IP rights to use your project designs and drawings throughout your project's lifecycle
- Advising on licensing and contract issues when using building information modelling (BIM) for your project

Implementing Effective Project Bonding and Performance Security

- Implementing appropriate levels of performance security through bonds and/or letters of credit, to ensure that contractor and supplier insolvency and non-performance risks are mitigated

Choosing the Right Project Insurance Approach

We recommend selecting your insurance strategy early, ideally during the pre-project phase.

- Evaluating insurance programs for your project, including owner procured and contractor procured models, in collaboration with your insurance advisers
- Ensuring your chosen insurance program is properly integrated into all contracts falling under the project insurance program
- Evaluating and negotiating insurance policy terms, as needed

Ensuring Occupational Health & Safety and Prime Contractor Compliance

- Ensuring contracts appropriately assign and allocate health and safety responsibilities for the project
- Identify and plan for how the owner's health and safety responsibilities and obligations will be met
- Identifying what is required by law to avoid personal liability for your senior leadership and board of directors

Immigration

- Ensuring non-resident personnel needed to perform the project are legally allowed to be in the country working on your project, including early identification and resolution of potential immigration-based delay

Managing Procurement

- Designing and implementing effective procurement processes
- Structuring effective submission requirements and evaluation criteria aligned with your project and contract needs
- Advising you on unexpected procurement issues

Regulatory Compliance and Indigenous Engagement

- Zoning and environmental compliance requirements
- Duty to consult and consultation process, including pre-consultation assessments and establishing a consultation plan
- Project compliance with existing greenhouse gas emission reduction strategies, climate change policies and sustainability targets

CONSTRUCTION/PROJECT EXECUTION PHASE

Once the project is underway, your legal team/strategic partner can add value by ensuring the carefully crafted procurement and contracting strategy is executed. With early involvement, the team can respond quickly and with the knowledge of the project background, to avoid implementation risk.

Occupational Health and Safety

- Advising on health and safety matters and on adequacy of contractor's "prime contractor safety plan"
- Assisting you during the OHS investigation if an accident occurs at the project site

Supporting Your Project Leadership Team

- Educating your project team on your contracts to ensure your rights and obligations are understood clearly
- Participating in internal project meetings and assessing developments against your contracts to help you manage risk
- Advising on material project issues as they arise, including contractor performance issues or major contract renegotiations

Supporting Your Contract Administration Team

- Monitoring for and responding to potential contractor claims for additional compensation and time extensions
- Assisting to formulate and draft owner-driven changes, claims and notices, including for default
- Assisting with notices and claims on project bonding and performance security

- Providing real-time advice on claims before and as they arise in order to establish consistent communications and decisions to avoid undermining your contract rights
- Reviewing project meeting minutes for early warning of contractor claims

Information Preservation and Management

- Establishing an effective document management system that will reduce your costs in case of litigation
- Advising on how to create and manage legally-sensitive documents and reports
- Capturing evidence in order to ensure institutional memory following project wrap-up in the event of a dispute

Initiating or Responding to Disputes and Claims

- Implementing an overarching claims strategy in accordance with your contracts
- Addressing contract interpretation and project disputes as they arise
- Effectively handling builders' liens and statutory holdbacks
- Representing you in mid-project or post-project mediation, arbitration or litigation
- Considering the need for and securing expert evidence

POST-CONSTRUCTION PHASE

Post-construction should be a time to reap the benefits of your successful project. Should you be drawn into any claims post-construction or discover warranty issues, your well-planned contracts will give you the best chance to prevail in the claim process. Your legal team is already up-to-speed on your project, and they will be ready to support you directly during this phase.

WE CAN HELP

Our experienced infrastructure lawyers are your strategic partners through all phases of your project to help you succeed. [Click here](#) to see profiles of our Infrastructure Practice Group.

The Supreme Court of Canada Decision in the Carbon Tax Reference: Implications for Federal Carbon Regulation

The Supreme Court of Canada has ruled that the Government of Canada has the constitutional jurisdiction to impose a national carbon tax. With further federal carbon measures on the horizon, how far does the ruling extend?

The Supreme Court Speaks

In 2021, the Supreme Court ruled on the **Carbon Tax Reference**.¹ The case involved federal legislation which, among other things, imposed a fuel charge on gasoline in any province or territory that did not meet federal GHG emission reduction benchmarks. The revenues collected are refunded to residents of the respective Province. The tax is not collected in provinces that have created their own frameworks to control greenhouse gas emissions which meet federal standards.

Three provinces challenged the constitutional validity of the legislation. In a 6-3 decision, the Supreme Court ruled that the legislation is valid pursuant to Section 91 of the Constitution, which empowers Parliament “to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces” (“POGG”). The court ruled that the legislation deals with **a national concern** and has “a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern.”

Federal CES Standard -Net Zero Electricity Grid by 2035

In late 2021, the Government of Canada released a [discussion paper](#) outlining plans for a Net Zero electricity grid by the year 2035. Net Zero by 2035 goes by the acronym **NZ2035**. The current target is Net Zero for the entire economy by 2050. The discussion paper states:

“The purpose of this discussion paper is to send a clear signal that the Government of Canada intends to move forward with regulations to achieve a net-zero electricity system by 2035.”

The discussion paper indicates that a key measure will be a clean electricity standard (“CE Standard”) under the *Canadian Environmental Protection Act*. The discussion paper mentions working with the other parties, and corresponding changes to Output Based Pricing System Regulations.

An unresolved issue is whether a CE Standard will continue to allow thermal generation beyond 2035 for the purpose of “backing up” new supplies of solar and wind power, which are intermittent. The discussion paper is inconsistent about this.

Disproportionate Impact

The new standard, if adopted, would have disproportionate impact on provinces such as Alberta and Saskatchewan. The British Columbia and Manitoba electrical grids are hydroelectric-based and are already close to carbon-free.



The court ruled that the legislation deals with a national concern

¹References Re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11.



In Alberta, out of a total of 16.3 MW of electricity generating capacity, 79% is thermal based (36% coal and 54% natural gas). The phase out of coal generation is expected to be completed by the late 2020s.

The Saskatchewan Rate Review Panel has expressed concern about the impact on electricity rates from the CE Standard:

“Accelerating Canada’s decarbonization of the electricity sector is a major step-change that will significantly compound the financial, logistical and technological challenges of developing a net-zero electricity system in Saskatchewan. SaskPower will need to rebuild approximately 75% of its current generating capacity in 13 years – a system that took 93 years to build. In fact, the proportion of total generation to transition away from carbon is among the highest in Canada (3,700 MW of 5,000 MW).”

When is Something a National Concern

Does the Supreme Court ruling in the *Carbon Tax Reference* mean that Canada could unilaterally impose a CE Standard?

This isn’t a case of *stare decisis*. That is, a province wouldn’t be precluded from mounting a court challenge of the CE Standard because of the previous court ruling. The Supreme Court went to great lengths to point out that it was ruling on a national pricing regime to reduce GHG emissions, not on minimum national standards to reduce GHG emissions. The CE Standard does not deal with pricing, it establishes minimum national standards to reduce GHG emissions. That’s exactly what was not decided in the *Carbon Tax Reference* so it’s still open for argument.

But would the outcome just be a repeat performance? Many of the public policy principles that were applied in the *Carbon Tax Reference* are also applicable to the CE Standard. In both cases, the issues involve the objective of reducing GHGs, the significant deleterious effects that could result to the environment, human health and economic prosperity from the absence or lack of stringency of GHG frameworks, and the lack of consistency of approach in all provinces. The court did, and would again, accept extrinsic evidence regarding the seriousness of climate change, the dire impacts on the planet, and Canada's international obligations. Arguably, these issues amount to a valid "national concern" which the federal government can validly regulate under the POGG provision of the constitution.

On the other hand, there are a number of conditions on use of the "national concern" doctrine. The carbon tax satisfied these conditions. A CE Standard might not. For example:

- A national concern should not upset the constitutional division of powers. Arguably, a CE Standard would be an intrusion into provincial matters such as natural resources, much more so than the carbon tax that only touched on taxation.
- A national concern should be "predominantly extraprovincial and international in character, having regard both to its inherent nature and to its effects." Arguably, the CE Standard would be a deeper reach than the carbon tax into matters that are substantially intraprovincial.
- A national concern should have "a scale of impact" on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power. A CE Standard would clearly have very substantial impact.

The Devil is in the Details

A high level of trust and co-operation will be needed among federal and provincial governments and industry to achieve a net zero grid, and unilateral federal action is hopefully a moot consideration. NZ2035 was discussed at the July, 2022, meeting of the Energy and Mines Ministers' Conference in St. John's.

The federal discussion paper poses a number of questions about the CE Standard, and mentions hydroelectricity and new transmission as potential solutions. Many commentators believe that new technologies such as hydrogen, carbon capture, improved battery storage and small modular nuclear, will be needed for Canada to meet its net zero targets. It will be interesting to see how the final form of the CE Standard factors in important details, such as what hydroelectric and transmission facilities might plausibly be available by 2035, and when new technologies might be available at scale, in order to achieve net zero.

WE CAN HELP

MLT Aikins represented the Attorney General for Saskatchewan in the Supreme Court. We understand the scope and significance of the carbon tax reference and help clients to navigate the complicated carbon pricing regime now that it has been determined to be constitutional. To contact our team [click here](#).

All of the statements in this article are solely those of the authors.

The Federal Government Weighs in on Provincial Carbon Pricing Regimes

Legislative Scheme

The Greenhouse Gas Pollution Pricing Act (the “GHG Act”) operates as a backstop piece of legislation: it only applies in provinces and territories that do not meet the federal benchmark. A number of provinces have created their own frameworks to control greenhouse gas emissions, to avoid a carbon tax. Revenues from the carbon tax are returned to the province or territory where they were collected.

In March 2021, the Supreme Court of Canada in a 6-3 decision ruled that this legislative scheme is constitutional and that Parliament has jurisdiction to enact this law as a matter of national concern under the peace, order and good government clause of section 91 of the *Constitution Act, 1867*.

The GHG Act has two parts: (1) a fuel charge (the carbon tax); and (2) an output-based pricing system for certain industrial sectors.

Federal Benchmark

In 2016, the Pan-Canadian Approach to Pricing Carbon Pollution set out the principles on which the federal approach to pricing carbon pollution is based, and established minimum national stringency criteria that all systems must meet to ensure they are comparable and effective. This initial benchmark applied for the period 2018 to 2022.

In August 2021, the federal government issued a new benchmark. The new benchmark is in effect from 2023 to 2030. Provincial and territorial carbon pricing systems are now required to meet or exceed the new benchmark to avoid the application of the federal carbon tax.

The new benchmark sets out Canada's minimum national price on carbon pollution at \$65 CAD per tonne of CO₂e, increasing by \$15 per annum.

Year	2023	2024	2025	2026	2027	2028	2029	2030
Minimum Carbon Price (\$/tonne CO₂e)	\$65	\$80	\$95	\$110	\$125	\$140	\$155	\$170

Provinces and territories are subject to the federal carbon pricing system unless they implement a price-based system or cap-and-trade system that provides for equal or greater carbon pollution measures as those set out in the federal benchmark.

Other features of the new benchmark include:

- All provincial and territorial carbon pricing systems need to cover the same proportion of emissions as would be covered by the federal backstop
- Provincial and territorial systems must not implement measures that directly offset, reduce or negate the price signal sent by the carbon price
- Output-based pricing systems for industrial emitters must maintain a marginal price signal equivalent to the national minimum across all covered emissions
- Protection against carbon leakage must be limited to at-risk sectors
- Offset credits must represent GHG emissions reductions or removals that are real, additional, quantified, unique, verified and permanent
- Provinces and territories must publish regular reports or information on the key features, outcomes, and impacts of their pricing systems, as well as compliance information and carbon market data to enhance accountability and market function oversight
- Cap-and-trade systems must have increasingly stringent annual GHG emissions caps from 2023 to 2030 that correspond with the projected emissions levels that would result from the application of the national benchmark in that year

Status of Provinces and Territories

Provinces and territories had the opportunity to propose their own carbon pricing systems for 2023-2030.

The federal government has accepted proposals for fully independent carbon pollution pricing systems (i.e. including fuel charge and OBPS) for 2023-2030 from the provinces and territories of British Columbia, Quebec, New Brunswick and the Northwest Territories.

The federal fuel charge or carbon tax will continue to apply in four provinces and two territories that did not propose systems: Alberta, Saskatchewan, Manitoba, Ontario, Yukon and Nunavut. The federal fuel charge will also apply in Nova Scotia, Newfoundland and Labrador, and Prince Edward Island, as those provinces' proposed systems did not meet the benchmark criteria.

The federal OBPS for industrial emitters continues to apply in Manitoba, as Manitoba did not propose any carbon pricing system for industrial emitters. It will also continue to apply in Prince Edward Island, Yukon, and Nunavut at their request. Provinces and territories that submitted compliant OBPS for industrial emitters include British Columbia, Alberta, Ontario, Quebec Nova Scotia, Newfoundland and Labrador, Saskatchewan and the Northwest Territories.

Moving Forward

The Government of Canada will conduct an interim review of the benchmark before the end of 2026 to confirm that benchmark criteria are sufficient to continue ensuring that price stringency is aligned across Canadian provinces and territories.

The Saskatchewan First Act and the Alberta Sovereignty Act

The governments of Alberta and Saskatchewan recently introduced legislation that aims to affirm their jurisdiction over the development of natural resources. This legislation is stated to come in response to what Alberta and Saskatchewan view as federal intrusion into matters of exclusive provincial jurisdiction.

The Saskatchewan First Act

Bill 88, *The Saskatchewan First Act* was introduced in the Saskatchewan Legislative Assembly on November 1, 2022. It passed the second reading on November 28, 2022 and was referred to committee.

The Bill affirms Saskatchewan's jurisdiction over natural resources, including non-renewable natural resources, forestry resources, and the generation and production of electrical energy. It states that the federal government has unilaterally intruded on Saskatchewan's jurisdiction over natural resources. The proposed Bill would amend federal constitutional legislation to affirm Saskatchewan's autonomy in relation to its areas of constitutional jurisdiction.

The Bill also establishes the Economic Impact Assessment Tribunal. This Tribunal has authority to assess federal laws and policies referred to it and make findings regarding the economic impact of the federal law or policy on Saskatchewan's economy.

Alberta Sovereignty within a United Canada Act

The Alberta Sovereignty within a United Canada Act received royal assent on December 15, 2022.

The Act allows Alberta's Legislative Assembly to approve resolutions stating that a federal law is unconstitutional or that it causes or may cause harm to Albertans. The resolution can include measures that Cabinet should consider taking in response to the federal initiative.

Once a resolution is approved, the Act allows Cabinet to make orders allowing a Minister to suspend the application or operation of a regulation, or to specify provisions that will apply instead of or in addition to a federal law. The Act also gives Cabinet the power to issue directives to provincial governmental entities in relation to federal laws.

Potential Impacts on the Energy Sector

It is not clear how the Alberta and Saskatchewan governments intend to use these legislative tools. Given positions taken by both governments in recent years, it is possible that they could be used to challenge federal legislation impacting natural resources development, including the *Greenhouse Gas Pollution Pricing Act* and the *Impact Assessment Act*. There is the potential for uncertainty for industry players while any legal challenges make their way through the courts.



Supreme Court of Canada to Hear Appeal on the Constitutionality of the Impact Assessment Act

In March 2023, the Supreme Court of Canada is scheduled to hear an appeal of a reference decision from the Alberta Court of Appeal regarding the constitutionality of the *Impact Assessment Act*.

The Impact Assessment Act

Coming into force in 2019, the *Impact Assessment Act* establishes the federal government's approach to evaluating the effects of proposed projects. The *Impact Assessment Act* prohibits the proponent of a designated project from advancing the project if it may cause certain effects relating to matters of federal jurisdiction, including effects in relation to Indigenous peoples, fish and fish habitat, and migratory birds. This prohibition is lifted once the Impact Assessment Agency of Canada decides that no impact assessment is required or the proponent receives a positive decision statement that the adverse effects within federal jurisdiction of the designated project are in the public interest.

The Alberta Court of Appeal's Decision

In *Reference re Impact Assessment Act*, 2022 ABCA 165, the Alberta government asked the Alberta Court of Appeal to determine whether the *Impact Assessment Act* and the *Physical Activities Regulations* were outside the scope of the federal government's legislative jurisdiction and therefore unconstitutional.

A majority of the Alberta Court of Appeal found that the *Impact Assessment Act* and *Physical Activities Regulations* are unconstitutional, finding that provincial governments have exclusive jurisdiction over intra-provincial projects, while the federal government's jurisdiction is limited to the consequences of those projects on federal heads of power. The majority found that the *Impact Assessment Act* improperly allowed

the federal government to oversee projects operating wholly within a province, even if a project had only minor impacts on areas of federal jurisdiction. The majority noted that certain designated activities subject to the *Impact Assessment Act* are within exclusive federal jurisdiction (including uranium mines or mills, nuclear facilities, offshore oil and gas facilities, international or interprovincial power lines, offshore oil and gas pipelines and renewable energy), but still found that the *Impact Assessment Act* and the *Physical Activities Regulations* were unconstitutional as a whole.

One dissenting Justice noted that the environment is an area where federal and provincial jurisdiction often overlap, and would have found that the *Impact Assessment Act* and *Physical Activities Regulations* are a valid exercise of the federal government's authority, since the legislation is targeted at effects within federal jurisdiction.

Appeal to the Supreme Court of Canada

The Attorney General of Canada appealed the Alberta Court of Appeal's decision to the Supreme Court of Canada. In this appeal, the Supreme Court of Canada may:

1. find the *Impact Assessment Act* and *Physical Activities Regulations* as a whole are unconstitutional;
2. find that portions of the *Impact Assessment Act* and *Physical Activities Regulations* are unconstitutional; or
3. find the *Impact Assessment Act* and *Physical Activities Regulations* as a whole are constitutional.



The Supreme Court of Canada granted leave to 22 parties to act as interveners in the proceedings. These include the Attorneys General of Ontario, Quebec, New Brunswick, Manitoba, Saskatchewan, British Columbia, and Newfoundland and Labrador, several First Nations, environmental non-government organizations, industry groups, and other interest groups.

Potential Impacts on Resource Development

If the Supreme Court of Canada finds that the *Impact Assessment Act* and the *Physical Activities Regulations* as a whole are unconstitutional, the scope of federal impact assessments over pending resource development projects could be significantly reduced, although certain projects will still be subject to federal oversight if federal permits are required. The Supreme Court of Canada could also decide to uphold the parts of the *Impact Assessment Act* and the *Physical Activities Regulations* that relate to projects within exclusive federal jurisdiction, in which case those projects would still need to be screened for a federal impact assessment. The Supreme Court of Canada could also find that the *Impact Assessment Act* and the *Physical Activities Regulations* are constitutional, maintaining the status quo with respect to federal and provincial environmental assessments.

The Supreme Court of Canada is scheduled to hear the appeal on March 21-22, 2023.

New Securities Disclosure Requirements: Reporting on Climate-Related Matters

Canadian Securities Administrators are proposing mandatory reporting on climate-related matters for public companies in Canada, which would take effect for non-venture issuers in 2024, in areas such as governance, strategy, risk management and metrics. In the U.S., and in standards under development, it may soon be mandatory for public companies to also disclose all Scope 1, 2 and 3 carbon emissions.

Current State: Voluntary ESG Reporting

To date, climate-related disclosure has been largely voluntary for Canadian companies. Although current securities regulation generally requires companies to disclose certain climate-related information if it is deemed material, at the moment there are no Canadian requirements that mandate a company to disclose ESG information (e.g. greenhouse gas emissions) in accordance with a specific reporting standard.

Financial Institutions

The federal government plans to bring mandatory climate-related reporting requirements to federally-regulated financial institutions such as banks and insurance companies beginning in 2024.

In May, the Office of the Superintendent of Financial Institutions issued Draft Guideline B-15 *Climate Risk Management*. The draft guideline includes expectations around climate-related financial disclosures closely aligned with the International Sustainability Standards Board (ISSB) *Exposure Draft on Climate-Related Disclosures*.

Starting in 2024, it is expected that financial institutions will begin reporting GHG emissions, climate-related risk, strategy and management plans as well as climate transition plans and net-zero commitments, with full implementation proposed by 2027.

MEASURING CARBON EMISSIONS

Carbon emissions from a corporation's operations are generally separated into three categories for the purposes of reporting: Scope 1, Scope 2 and Scope 3.

- **Scope 1** emissions cover the greenhouse gas emissions that a company makes directly, for example, while running its machinery and vehicles.
- **Scope 2** emissions are the emissions a corporation makes indirectly, for example, by purchasing electricity produced with carbon emissions.
- **Scope 3** emissions are all of the other indirect emissions that the corporation is indirectly responsible for, up and down its value chain. For example, from buying products from suppliers, and from its products when customers use them.



These requirements are expected to indirectly affect many Canadian companies, who will be requested by their bank or lender to provide ESG-related information to facilitate the bank's own ESG reporting requirements, and to assess when and on what terms financing and insurance products will be provided.

U.S. Public Companies

South of the border, the Securities and Exchange Commission (SEC) sought comments on its proposed rule on climate-related disclosures, in March. Under the rules, a registrant will be required to disclose information about its Scope 1 and Scope 2 emissions. In addition, a registrant will be required to disclose Scope 3 emissions, if material, or if the registrant has set a target or goal that includes Scope 3 emissions. They must also conduct **scenario analysis** of the resiliency of the issuer's strategies to climate-related risks and opportunities, taking into consideration a transition to a lower-carbon economy consistent with a 2°C or lower scenario and, where relevant to the issuer, scenarios consistent with increased physical climate-related risks.

The SEC received comments from sectors such as oil and gas expressing concerns related to Scope 3 emissions reporting, implementation timelines, liability and compliance costs. The SEC itself [has acknowledged](#) that compliance costs will be significant, with average costs estimated at \$677,000 USD per year. The SEC made some efforts to balance the burdensome nature of the proposed rule, with exemptions from reporting on Scope 3 emissions by smaller reporting companies, safe harbor from certain forms of liability and phased implementation for Scope 3.

The SEC's proposed rule will apply to all U.S. issuers as well as foreign private issuers. Currently, Canadian issuers reporting under the multijurisdictional disclosure system would not be subject to the proposed rule. However, the SEC has asked for comments on whether foreign companies reporting under that system should be exempt, leaving open the possibility that Canadian companies listed on a U.S. exchange may ultimately be subject to the proposed SEC rule.

If the proposed rule is adopted by the end of 2022, it would require large accelerated filers to begin making climate-related disclosures in annual reports in 2024. Accelerated and non-accelerated filers would begin making disclosures in 2025, and smaller reporting companies would begin in 2026. Each group would begin by reporting data from the previous fiscal year.

Whether or not Canadian companies are directly impacted by the proposed SEC rule by virtue of being listed on a U.S. stock exchange, many will be indirectly impacted. It is likely a Canadian company that is within the supply or value chain of a U.S. listed company will be expected to provide ESG information to enable their business partner to comply with the SEC rules.

Consistent Standards

As regulators in Canada and the U.S. move to mandatory climate-related disclosure, substantial work is underway globally to harmonize and standardize ESG reporting frameworks.

The ISSB was created to deliver a global baseline of sustainability-related disclosure standards. Disclosure provides investors and others with information about companies' sustainability-related risks and opportunities, to help them make informed decisions. While ISSB requirements do not apply directly to Canadian companies, both the CSA and SEC have indicated support for the ISSB and elements of the ISSB standards are reflected in their current proposals. The ISSB has issued two exposure drafts that were open for public comment during 2022, *IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information* and *IFRS S2 Exposure Draft on Climate-related Disclosures*. In October, the ISSB voted unanimously to require company disclosures on Scope 1, 2 and 3 emissions.

The Task Force on Climate-Related Financial Disclosures ("TCFD") is another body that promotes company reporting on both financial and non-financial indicators, to provide the full picture to investors and other stakeholders. Their framework prompts companies to disclose details about their operations in four categories: governance, strategy, risk management and metrics.

What's Next for Canada

In late 2021, Canadian Securities Administrators (“CSA”) **proposed National Instrument 51-107**. The CSA is proposing mandatory disclosures related to the four core elements of the TCFD approach. There will be a “Comply or Explain” requirement for Scope 1, 2 and 3 carbon emissions – a company will be required to disclose but permitted to opt out of disclosure with a public explanation as to why. The proposal also indicates that, as an alternative, the CSA is considering mandatory Scope 1 disclosure.

The CSA received 131 comment letters on its proposal. Similar to the SEC, regulatory burden and the administrative cost of climate-related disclosures – especially in relation to scenario planning and Scope 3 emissions – were raised in the majority of comment letters from companies in the oil and gas, agriculture and mining sectors.

Examples of Mandatory Disclosures in proposed National Instrument 51-107 (based on TCFD)

Strategy

Disclose the actual and potential impacts of climate-related risks and opportunities on the organization’s businesses, strategy, and financial planning where such information is material

Reporting issuers would be required to describe the following, where such information is material:

- the climate-related risks and opportunities the issuer has identified over the short, medium, and long term
- the impact of climate-related risks and opportunities on the issuer’s businesses, strategy, and financial planning

Risk management

Disclose how the organization identifies, assesses, and manages climate-related risks

Reporting issuers would be required to describe the following:

- the issuer’s processes for identifying and assessing climate-related risks
- the issuer’s processes for managing climate-related risks
- how processes for identifying, assessing, and managing climate-related risks are integrated into the issuer’s overall risk management



The slate of new disclosures required by National Instrument 51-107 will mean a substantial increase in administrative effort for public companies.

It is unlikely National Instrument 51-107 will be the final word in this area. Further disclosure requirements (Scope 1, 2 and 3 emissions; biodiversity; Indigenous engagement) may simply be a matter of time.

Should National Instrument 51-107 become effective by the planned date of December 31, 2022, non-venture issuers would be required to start making disclosures starting in March 2024, and venture issuers would be required to start in April 2026. Both groups would begin by reporting data from the previous financial year.

The slate of new disclosures required by National Instrument 51-107 will mean a substantial increase in administrative effort for public companies. There is every reason to believe that Securities administrators will require climate-related disclosures to be fully explained and supported to the same rigorous standards as other mandatory disclosures. The 2024 financial reporting cycle promises to be a busy one.





Launch of Canada's Carbon Offset Trading Market

In May 2022, Canada issued [Regulation SOR/2022-111](#) pursuant to the *Greenhouse Gas Pollution Pricing Act*. The Act and regulation establish a set of rules for how projects can generate tradeable credits from landfills pursuant to the Canadian Greenhouse Gas Offset Credit System (the “credit system”).

The purpose of the regulation is to capture methane and other greenhouse gases (“GHG”) that would otherwise seep into the atmosphere from landfills. The gas can be destroyed in an authorized device, burned in a turbine to produce electricity, burned to create heat or injected into a gas pipeline.

Participants obtain one tradeable offset credit for each tonne of GHG reduced or removed from the atmosphere. Participants can use their credits to offset their requirements under the federal Output Based Pricing System, or they can sell the credits to others who are looking to meet voluntary or mandatory climate commitments.

Participants must register their projects under the Landfill Methane Recovery and Destruction protocol. The eligibility requirements are quite prescriptive and technical.

The government expects the price of credits to broadly track Canada's price on carbon, which is currently set at \$50 CAD a tonne and will ramp up to \$170 CAD a tonne by 2030.

Landfills – Just the First Step

The credit system is intended to support **a domestic carbon offset trading market**, and landfills are just the first step. [Government officials say](#) protocols for four other sectors including agriculture and forest management are underway. The government is also developing protocols for carbon capture technology and considering how to facilitate Indigenous participation in the credit system.

The design of the credit system is intended to align with the *Pan-Canadian GHG Offsets Framework* agreed by the Canadian Council of Ministers of the Environment in 2018.

An Interview with Carbon Assessors

We had a chance to connect with Logan Downing from Carbon Assessors to discuss some hot button topics in western Canadian carbon markets. If you would like to get in touch with him to chat about Carbon Assessors or how they can assist your business you can reach him at: logan@carbonassessors.com.

Q: What is Carbon Assessors and how did it start?

A: Carbon Assessors is an intelligence company that helps to demystify the various compliance carbon markets across Canada and was founded by a group of individuals who recognized the opportunity carbon markets present.

My background is in refined products trading and marketing and the rest of our team is comprised of individuals with experience in physical commodities. To give some perspective, in Canada alone, there's about 43 billion liters of product that's moved physically every single year. Now that's around 250 different sale point locations so, you have to have the right market incentives, right market structures, price signals - what I like to call market infrastructure. None of this exists in the carbon markets.

That's what our team likes to do - creating market indexes and providing research and consulting services to help these markets work more efficiently. We take a traditional approach as we look at the markets from a physical commodity trading perspective. That's a competitive advantage for us as we're predominantly competing against think tanks, academics and environmental scientists in this space who don't have the same commercial background.

Q: Why do you think carbon markets are so difficult to penetrate and understand? Is there a reason they're so opaque?

A: First, there's currently about 10 different carbon markets across Canada all with different rules and regulations. They're not fungible, they're regional and they're immature. They require a lot of economic experience in order to navigate as well as a good understanding of the regulations.

Second, is that carbon is a very difficult thing to embed into our market-based system which is predicated on direct value-add. This is an externality that we're trying to price into a market system and it's very difficult to do. If you do it poorly, it turns into a retarder on your economy without providing any benefits. If you do it well, you can help reduce the amount of inflation that this causes, and you can bolster some innovative products that reduce the carbon intensity of fuels and different things. So, it's tricky to get right and two levels of abstraction make it difficult to understand because it doesn't have that physical commodity, tangible value component to it.

Q: That said, do you think there is an opportunity here?

A: Yes, absolutely. The hallmark of new markets is the inefficiency. If you showcase the opportunity in the spreads, then you have more actors step in. What we see in the compliance credit space is there's aggregation possibilities. If you aggregate various small tranches of credits, and you earn your cut on that and you go and sell it to a large integrated company - that's one way that folks make money. There's also brokering. There's the production of credits or offsets which can be sold. There are all sorts of engineering services that will be required to do natural reductions on facilities and all the technical trades required to implement that. Then, on the voluntary side of things, there is the production of offsets to then take it and market and sell the spreads. So, there are lots of revenue opportunities. Our goal though is to make sure that the markets operate efficiently. We'd like to see those spreads narrow and for this to look more like a commodity every year.

Q: *For those people who don't know, what is a compliance credit and how does it differ from a voluntary credit?*

A: The compliance markets are government mandated or regulatory in nature. I like to think of them as high quality and expensive. The government, through their carbon tax and through the pollution pricing framework, can basically create a government mandated contango. In trading terms, that just means the future price is higher than the present price, which causes a lot of different distortions. But the fun part is it is increasing the price for compliance markets, which is increasing supply. This forces the government to tighten rates in the carbon market so that we meet those price signals that the federal government wants us to backstop.

Voluntary markets fall under what I like to call “social license to operate” and are not mandated or regulatory in nature. They are effectively a voluntary way for actors to participate in carbon reductions. For example, if you made a public target to meet net zero, but the engineering reality of it is pretty difficult, you can go out to the voluntary market and buy offsets so that you can then claim your net zero obligations have been fulfilled.

Q: *If supply is constrained, are you seeing derivative products being created in respect of those compliance credits yet?*

A: I haven't seen carbon derivatives yet in Canada. I think there's been attempts, but there's some more preliminary steps that have to be made to do so. If you don't have a screen on over the counter (OTC) transactions, it's pretty hard to create any instruments. And then there's not even a spot index or even a monthly spot price to point to. We do price discovery to create a public spot price in Alberta. It's all about the foundational elements - if you don't have an OTC spot price, well, it's going to be hard to do anything else. Once that's in place, then the next conversation is some kind of futures contract but we need more market sophistication before that can be successful.

Q: *What are the major hurdles for any organization that might not know the ins and outs of these markets?*

A: It's always starting with where your position is today. Understanding if you are net long or net short. Even if you're not engaging in these markets, you should understand if you will be net long or net short in the future. Likewise, you may have a position and not know it, smaller facilities can typically opt into participating in these markets even when not mandated. It's just a function of do you know that or not. If you know that you're short that means you probably need to start working with your internal engineering teams to figure out natural or organic ways to reduce emissions. And then again when they start to hit plateaus or cost curves that require increased carbon tax price to initiate them. Until that point you then can go to the marketplace to buy offsets within the compliance system. You're going to have to get embedded with the marketplace and understand who the actors are, what they're worth, what their positions are, get familiar with the regulations, which are substantial, just because it's a new market. These are not obvious commodities.

There's also the transaction component of this, including figuring out who your direct counterparty could be and how to mitigate any kind of risks with these instruments. The compliance market is a little more safe from the transaction perspective, just because you're dealing with local counterparties and they're usually pretty large. This is in comparison to the voluntary market, where it's global actors of all scale and all levels of due diligence. Voluntary is a bit more of a low trust environment. Compliance is a little higher. Helping navigate these issues are all services that Carbon Assessors provides.

Q: *What are two things that you think producers should be aware of in this market?*

A: Quality is a really important feature to the environmental market across the board. Again, compliance markets are a lot more regulated, so you can be surer of the quality, and you can also get invalidation insurance. If they step into the voluntary markets, they need to be very mindful of quality. If you can demonstrate quality, you can receive almost two times the price that you're going to receive. If you can't and it's poor quality, then it's going to be a lot less. There's a lot of associated branding issues with that. If you buy poor quality units and you get caught with that, people will accuse you of greenwashing and they will go public with it. There's precedent for using consumer protection regulations to sue companies.

We always say just start early. Now is the time to start. If you start now, there's many ways outside of just purchasing offsets from the marketplace that you could leverage to essentially manage your environmental exposure. And we're happy to work with clients to navigate those.

Manitoba Bill 36

On November 3, 2022, Manitoba Bill 36² received Royal Assent. The bill will have implications for Manitoba ratepayers, Manitoba Hydro and independent power producers in the province.



Electric Vehicles

Under Bill 36, privately-run electric vehicle charging stations will be expressly permitted in Manitoba. Previously, under Section 15.2 of *The Manitoba Hydro Act* (the “Act”), no person other than Manitoba Hydro was permitted to engage in a **retail supply**, defined as a sale to the end user of the power. Bill 36 also allows non-utility participation in a few other, narrow circumstances:

- third parties will be allowed to provide a supply of green, renewable power in isolated locations that are not connected to the provincial power grid, with LGIC approval
- landlords will be expressly authorized to distribute power to their tenants, resolving any uncertainty that may have existed

Approval of Major Projects

The Public Utilities Board of Manitoba (PUB) has reviewed past hydroelectric projects in Manitoba at the request of the Lieutenant Governor in Council (LGIC). Substantial costs can be incurred prior to the hearing to prepare a project for review (e.g. planning; engineering; environmental studies; Indigenous consultation). Bill 36 makes PUB review mandatory and introduces a new, staged approval process, as follows:

- A preliminary estimate of the planning costs for a new project must be approved in advance by the PUB
- Once planning is complete, if the utility wishes to proceed with a project, the merits of the project are reviewed by the PUB at a public hearing
- Following review, the PUB issues a recommendation to the LGIC on whether or not the project should proceed, accompanied by a summary of the rate implications
- The LGIC has final authority to approve the project

¹The Manitoba Hydro Amendment and Public Utilities Board Amendment Act.

The new scheme applies to a “major” facility, defined as a generation plant greater than 200 MW or a transmission facility greater than 230 kV. There are also new requirements for LGIC approval of major export commitments by Manitoba Hydro, LGIC approval of power sales to Manitoba Hydro greater than \$5 million in value, and PUB approval of power sales to Manitoba Hydro greater than \$200 million in value.

Integrated Resource Plan

Manitoba Hydro will be required to regularly publish an Integrated Resource Plan (an *IRP*), pursuant to additions to Section 38 of the Act. Details are as follows:

- It will be mandatory for Manitoba Hydro to submit an IRP for approval by the LGIC at a frequency prescribed in regulations. (In other provinces the IRP is generally updated every 3-5 years)
- The IRP will cover a planning period of at least 10 years ahead
- The IRP will include the utility’s load forecast; supply side options; impact of load reductions resulting from efficiency programs; and any major new facilities under consideration
- The IRP must reflect factors including the purposes and objects of the *Act*, government mandate letters and directives to the utility, socio-economic impacts, sound risk management and economic and environmental sustainability
- The IRP must include a description of stakeholder consultations that were carried out
- The Minister may request changes to an IRP
- The LGIC has the option of referring an IRP to the PUB for public review
- Once an IRP is approved by the LGIC, it must be published on Manitoba Hydro’s website

Based on the experience in other provinces, the regular publication of IRP’s could serve to inform the public discourse on energy-related issues. IPPs, Indigenous communities and other interested parties may benefit from published guidance on when new generation resources are expected to be needed.

Rate Review Process

Bill 36 changes the regulation of Manitoba Hydro by the PUB. Highlights are as follows:

- Manitoba Hydro electricity rates will be approved by the PUB every three years
- Rates are to be based on factors such as the utility’s revenue requirement
- Manitoba’s Treasury Board will have authority to formulate financial targets to be achieved by the utility, and the PUB will be required to consider these financial targets when approving rates. That includes achievement of a debt-capitalization ratio of 80% by 2050
- A rate increase in any year cannot exceed 5% or the rate of inflation, whichever is less
- The PUB will be restricted from issuing directives to the utility dealing with its operations, capital expenditures or social policy

While Bill 36 mainly deals with electricity, the LGIC is also given authority to reform the regulatory process for natural gas, through regulation-making powers.

Manitoba Hydro will be required to regularly publish an Integrated Resource Plan



Alberta Bill 22

On May 31, 2022, [Bill 22](#)³, received Royal Assent in Alberta. The Bill will support a number of low carbon energy alternatives.



Energy Storage

Many solar and wind generation systems make use of batteries and other energy storage systems. Bill 22 provides guidance about how these fit within the legislative framework.

Distribution and transmission utilities are permitted to own and operate energy storage assets under specific conditions. The definition of “electric distribution system” in Section 3 of the *Hydro and Electric Energy Act* is amended to include “an energy storage system.”

Bill 22 also adds definitions of energy storage to the *Alberta Utilities Commission Act* and establishes the agency’s approach to hearings for approval of energy storage facilities.

In May 2022, the AESO [released](#) its related draft *Energy Storage ISO Rule Amendments*, which are predicated on the passage of Bill 22. The AESO noted that current ISO rules were not generally developed in contemplation of the integration of energy storage technologies to the interconnected electric system. The amendments include changes to: (i) integrate energy storage into the market; (ii) clarify energy storage technical and operating requirements; and (iii) incorporate provisions for Fast Frequency Response Service and Adjustment for Load on the Margin.

A new definition of **Aggregated Facility** is directed at smaller installations (under 9 MW) of generation integrated with a storage device. The 9 MW limit is based on an [engineering consideration](#) – many wind turbines and solar panels on a common collector bus that are under 9 MW do not need a governor. 9 MW is not a limit on the size of a total aggregated facility, but rather the size of each individual element in the facility. This framework allows operators of small generation resources in a localized area to optimize common control and power elements to meet technical requirements. It would be more onerous for them to comply with requirements based on each individual unit. Facilities over 9 MW continue to require a dedicated governor, and co-located facilities can still operate in the market as a single asset.

One of the stated goals of the drafters was to use neutral language in technical definitions, to allow for future technologies for the aggregation of generation and storage that haven’t yet been invented.

³ *The Electricity Statutes (Modernizing Alberta’s Electricity Grid) Amendment Act, 2022.*

Unlimited Self-Supply with Export

Many customers implement solar and wind generation solutions to self-supply their energy needs, and any surplus energy is sold into Alberta's power pool. The Alberta Utilities Commission ("AUC") has licensed a number of such facilities, but that changed with the **Smith** decision in 2019 (see insert on page 50). The AUC ruled that there is no provision in Alberta legislation to authorize this type of configuration. Facilities approved prior to 2019 were treated as grandfathered.

Bill 22 addresses the gap in the legislation by creating a new category of market participant, which is being called **Unlimited Self-Supply with Export**. Developers will be able to build new generation both to serve their own needs and sell surplus into the power pool. Several legislative provisions are amended, including Section 2(1)(b) of the *Electric Utilities Act* and the definition of "self-supply" in the Act.

Section 122 of the Act is amended, such that the ISO tariff must require self-supply customers to pay a "just and reasonable" share of grid costs. Developers will have to await further guidance from the AESO and regulators to understand the ISO tariff rate and other terms and conditions that will apply to the new category.

Long-Term Planning

Section 105 of the Act creates a new duty for owners of electrical distribution systems, to prepare long-term electric distribution system plans. Section 108 of the Act gives the Minister broad powers to make regulations regarding these long-term plans. The emphasis on long-term planning is based on the many challenges facing the electrical grid, such as increased electric vehicles, distributed generation and energy storage.

Wind Down of the Balancing Pool

Bill 22 reassigns to other entities several duties of the Alberta Balancing Pool, in anticipation of the expected wind down of the Balancing Pool by 2030.

The **Balancing Pool** was a feature of Alberta's privatized electricity system at its inception. To foster competition, power providers and municipal utilities could purchase electricity from legacy coal power plants at pre-determined rates and sell it into the grid through the Balancing Pool. The pool was profitable for several years. In 2015, Alberta introduced levies on coal-fired power plants. At that point, major power providers terminated their power purchase agreements saying they were unprofitable. The Balancing Pool assumed these obligations, and the resulting costs of \$1.3 billion are being recouped over time from ratepayers through an extra fee on power bills.

The Smith Case Discloses a Gap in the Legislation

In 2019, the Alberta Utilities Commission (AUC) ruled that under Alberta legislation, there is no authority for a generator to use part of their energy output for self-supply and sell the surplus into the grid ([Decision 23418-D01-2019, E.L. Smith Solar Power Plan, February 20, 2019](#)).

The case involved a 12 MW solar farm that was being built by EPCOR Water Services to serve a new water treatment plant in Edmonton. EPCOR planned to use 70% of the energy to serve the water plant and sell the remaining 30% of the energy into the provincial power pool.

EPCOR filed applications with the AUC to construct and operate the power plant, pursuant to Section 11 of the *Hydro and Electric Energy Act*. This was granted based on the AUC's assessment of the environmental and other impacts of the project.*

EPCOR also applied to interconnect the power plant to the grid pursuant to Section 18 of the *Act*. This was denied, and AUC upheld the denial. The AUC considered two competing principles:

1. In Alberta, the general rule is that a person must offer the entire power output of their generation facility to the power pool. Section 18(2) of the *Electric Utilities Act* provides that all electric energy entering or leaving the interconnected system must be exchanged through the power pool, with exceptions. Section 101(1) of the *Act* says that a person wishing to obtain electricity for use on a property must make arrangements for the purchase of electric distribution service from

the owner of the electric distribution system in whose service area the property is located. Section 2(f) of the *Fair, Efficient and Open Competition Regulation* provides that not offering to the power pool all electric energy from a generating unit that is capable of operating is conduct that does not support the fair, efficient and openly competitive operation of the electricity market.

2. By way of exception, a person can use the output of a generation facility to self-supply power for their own needs. Section 2(1)(b) of the *Electric Utilities Act* says the Act does not apply to “electric energy produced on property of which a person is the owner or a tenant, and consumed solely by that person and solely on that property.” The regulation contains a similar exception for electric energy that is used on a property for the market participant's own use.

EPCOR argued that its use of 70% of the solar energy to self-supply was authorized by Section 2(1)(b), and the remaining 30% of the energy would be offered into the power pool as required.

The AUC ruled that the exception in Section 2(1)(b) was not available because the energy was not being consumed solely by EPCOR and solely on EPCOR's property.

**In Alberta, the regulator does not consider the need for or cost of a project as these are deemed to be internal matters for facility owners and investors in a competitive market.*

British Columbia Bill 37

In November 2022, [Bill 37](#)⁴ received Royal Assent in British Columbia. The bill makes several changes to the *Oil and Gas Activities Act*, now renamed the *Energy Resource Activities Act* (the Act) and related legislation. Bill 37 creates a regulatory framework for hydrogen production in the province and facilitates carbon capture and storage projects. The bill also expands the scope of legal responsibility for orphan oil and gas wells.

British Columbia Energy Regulator

Pursuant to Section 2 of the Act, the BC Oil and Gas Commission is renamed The British Columbia Energy Regulator (the “regulator”). Membership on the board of the regulator is increased from three to between five and seven, and at least one director must be Indigenous. The purposes of the regulator in Section 2 are expanded, as follows:

“The purpose of the regulator is to regulate energy resource activities in a manner that protects public safety and the environment, supports reconciliation with Indigenous peoples and the transition to low-carbon energy, conserves energy resources and fosters a sound economy and social well-being.”

Pursuant to this and related changes, hydrogen projects are now subject to a similar scheme of regulation as petroleum and natural gas. For example, a permit will be required for a hydrogen manufacturing plant. There was previously no cohesive regulatory framework for hydrogen in B.C. Government materials say the changes are intended to provide greater certainty for investors.

Development of Hydrogen

The definition of “energy resource activity” in Section 2 of the Act is expanded to include:

“a facility for manufacturing hydrogen, ammonia or methanol from petroleum, natural gas, water or another substance.”

⁴ *The Energy Statutes Amendment Act*, 2022, [SBC 2002], c. 42.





Carbon Capture and Storage

Under changes to Section 129 of the Act, anyone proposing to use a storage reservoir for carbon dioxide or other specific substances will require either a license or a lease under the Act. Changes to Section 125 of the Act clarify government's right to explore for, access, develop and use underground storage space for carbon dioxide and other specific substances, including under private land. As is currently the case for oil and gas, a company will need a right of entry to go onto private land and the land owner will receive compensation for loss or damage to the surface of their land, and rent for the use of the land.

Orphan Oil and Gas Wells

Currently, oil and gas operators in B.C. operate their wells, facilities and pipelines in accordance with a permit from the BC Oil and Gas Commission, and the permit holder must rehabilitate the site in defined circumstances. If a permit holder becomes insolvent, cannot be located or no longer exists, the commission can designate the site an **orphan site**. The Orphan Site Reclamation Fund – a levy on industry permit holders – is used to pay the cost of decommissioning and restoring orphan sites.

Changes to Section 43 of the Act expand the liability net beyond the permit holder to include anyone with a legal or beneficial interest in an oil and gas or storage activity. The expanded liability provisions will, for example, capture a company with a limited ownership stake in the permit, and company directors and officers. Section 100 of the Act allows government to make regulations to further clarify who is responsible.

Under Section 43, the regulator can order a responsible person to assume a permit, carry out work or reimburse the government for work completed. The regulator can hold one of the responsible persons liable for the entire cost if the others cannot or will not pay their share. Changes to Section 45 of the Act authorize government to transfer tenure for a site to someone willing to take it on to ensure it does not become an orphan site, and authorize the selling of goods abandoned at an orphan site and depositing the proceeds into the Reclamation Fund.



The expanded liability provisions will, for example, capture a company with a limited ownership stake in the permit, and company directors and officers

2022 Court Decisions in the Energy Field

TransAlta v. Alberta Utilities Commission: Enforcement of Arbitration Decisions

The TransAlta case⁵ highlights some of the complications that can arise when parties use alternative dispute resolution to resolve a disagreement that is also before a regulatory body.

TransAlta had a Power Purchase Agreement to sell electricity from two units of its Sundance coal-fired generating station to the Alberta Balancing Pool. The coal supply came from TransAlta's Highvale mine. In 2018, the Balancing Pool terminated the agreement. Under the *Electric Utilities Act*, the Pool was entitled to terminate provided that it paid TransAlta the closing net book value of the generating units. Under the *Power Purchase Arrangements Regulation*, an owner of generation may apply to the Alberta Utilities Commission (the "AUC") for compensation for decommissioning a generating unit, calculated as the difference between the cost of decommissioning and the corresponding revenues the generator has collected from its customers over the years.

In 2018, TransAlta applied to the AUC to approve compensation for the decommissioning. In part, it sought to recover costs for the eventual decommissioning of the Highvale mine. The Balancing Pool objected, and asked the AUC to rule that as a pure matter of law the mine costs were not payable. The AUC rejected TransAlta's application and said that relevant facts and evidence had to be considered in order to decide the question. The Balancing Pool asked the AUC to review and vary its ruling, which the AUC denied. The AUC said that a review and vary application was premature since the proceeding was still underway.

TransAlta and the Balancing Pool did not just disagree about compensation for the decommissioning, they also disagreed on the closing net book value of the generation units. The parties agreed to resolve that dispute through binding arbitration. At arbitration, TransAlta argued that the net value of the mine had to be included in the calculation, based on the definition of "generating unit" in the legislation. The arbitrators agreed.

TransAlta then applied to the AUC in 2020 for a ruling on compensation for the decommissioning. It argued that circumstances had changed as a result of the arbitration and the issue of mine costs was now "res judicata" since the arbitrators had decided the issue. It argued that the mine costs were now payable as a matter of law. The Balancing Pool argued that this application to the AUC was premature since the compensation proceeding was still underway and there had not yet been a hearing on all the facts and issues. The AUC refused to issue an order that the mine costs were payable as a matter of law, saying that it would make its own determination on compensation.

⁵ *TransAlta v. Alberta Utilities Commission*, [2022] A.J. No. 140 (Alta. C.A.).

TransAlta appealed the AUC decision to the Alberta Court of Appeal. The appeal was dismissed. The court ruled as follows:

1. The appeal was premature, because the AUC decision was interlocutory. The court noted that the AUC had rejected a similar application from the Balancing Pool for similar reasons. TransAlta had not exhausted all of its recourses before seeking a court order. The court stated that the AUC was the master of its own practices and procedures, and that the AUC's long-standing practise on interlocutory matters must be respected by the courts.
2. The "action" taken by the AUC was not an order or decision capable of being appealed.
3. The court said that a ruling from a private arbitration between two parties is not binding on a regulatory tribunal statutorily charged with making a determination in the public interest. The court agreed that *res judicata* or issue estoppel might arise if two parties decided a matter by arbitration and then the same two parties argued it in court. However, the parties to the arbitration [*TransAlta and Balancing Pool*] were not the same parties in the court appeal [*TransAlta and AUC*].

Ermineskin v. Canada: Duty to Consult on Economic Interests

When an impact benefit agreement is finalized with an Indigenous group, it can be enforced as a contract. In addition, the Ermineskin case⁶ demonstrates that the Crown will have a duty to consult before taking actions that could impact economic benefits under the agreement.

Coalspur Mines was developing a coal mine on Traditional Territory and Treaty 6 Territory of the Ermineskin Cree Nation in British Columbia. Coalspur entered into impact benefit agreements with the Band. Initial phases of the project were approved at the provincial level. Phase II of the project involved a larger footprint and the issue was whether Phase II should be deemed a "designated project" (a "Designation")⁷, which requires a federal impact assessment.

In 2019, environmental NGO's asked the minister to issue a Designation. The Impact Assessment Agency of Canada (the "Agency") consulted affected indigenous groups about this request, including Ermineskin. Ermineskin opposed a Designation because it undermined its impact benefit agreements. The Agency recommended against a Designation and the minister refused to issue one. In 2020, another request was made for a Designation, by environmental groups and two indigenous communities. This time, the Agency did not seek comments from affected Indigenous groups and it again recommended against a Designation, but this time the minister proceeded to issue a Designation.

In 2021, the Federal Court of Canada overturned the Designation on the basis that Canada failed to consult Ermineskin before issuing the Designation.⁸ The court ruled there was a duty to consult because the projects had the potential to adversely impact hunting, trapping, fishing, and gathering rights. The court also found that the impact benefit agreements created an economic interest that engaged the duty to consult. The judge said ***these economic, community and other benefits are "closely related and thus derivative" from Aboriginal and treaty rights.***

The outcome of this particular dispute is not yet clear. After the 2021 court judgement was released, federal authorities did consult the Band about a Designation. The Band continued to oppose the Designation in these discussions, however, Canada made the decision to proceed with a Designation. In 2022 court proceedings,⁹ the Federal Court of Appeal ruled that the duty to consult had been satisfied and Canada was entitled to proceed with a Designation. However, in unrelated litigation, the Alberta Court of Appeal has ruled that the *Impact Assessment Act* is unconstitutional and the final outcome remains at issue.

Regardless, the judge's comments about the protection of economic interests will have continuing interest for indigenous communities, governments and resource developers.

Rieger v. Plains Midstream: Who Can Sue in a Class Action Lawsuit

An oil spill can have significant financial repercussions but the Rieger case is a reminder that there are restrictions on who can file a class action lawsuit.

In 2012, light sour crude oil from a pipeline owned and operated by Plains Midstream was released into Red Deer River, and migrated downstream to Gleniffer Lake, Alberta. The river and lake were closed for recreational purposes. Plains entered into settlements with 517 landowners, residents and businesses who were directly impacted by the spill, at a cost of approximately \$40 million.

Suzanne and Darin Rieger were not included in the settlements. They owned two lots at Gleniffer Lake which they intended to sell. Their properties did not abut the lake and did not suffer any physical damage. However, the Riegers argued that the value of their property was diminished. The Riegers filed a statement of claim under the *Class Proceedings Act* on behalf of themselves and others impacted by the oil spill, including the 517 settled cases, with Suzanne Rieger named as the representative plaintiff. The claim was based on strict liability, negligence, vicarious liability, nuisance, trespass and breach of the *Environmental Protection and Enhancement Act*. Most of these claims were based on damage suffered by the other plaintiffs.

A certification hearing was held in 2020. Plains argued that it did not owe a duty of care to the Riegers, because they had suffered pure economic loss. The Chambers Judge granted certification of the class action and named Ms. Rieger as the representative plaintiff.

Shortly after, the Supreme Court of Canada released its ruling in another case dealing with pure economic loss in a class action context, *Maple Leaf Foods*.¹¹

Plains appealed the Chamber Judge's ruling to the Alberta Court of Appeal. The Court of Appeal granted the appeal, and the suit was dismissed.

The Court of Appeal noted that Section 5 of the *Class Proceedings Act* requires the plaintiffs to disclose at least one cause of action, assuming the facts pled are true. A claim should only be struck if it is "plain and obvious" that it cannot succeed. In this case, the only potential cause of action by the Riegers against Plains was negligence. The court cited the *Maple Leaf* decision, where the Supreme Court said that a duty of care in negligence requires a "proximate relationship" between the plaintiff and the defendant. Where the damage consists of pure economic loss, such a proximate relationship only applies in cases of negligent misrepresentations or performance of services, the supply of shoddy goods or structures or in certain novel situations. The Court of Appeal concluded that the Riegers' claim for pure economic loss was hopeless as a result of the *Maple Leaf* decision. They had failed to prove a sufficiently proximate relationship.

⁶ *Ermineskin Cree Nation v. Canada (Environment and Climate Change)* (2021), 2021 FC 758 (Fed.Ct.).

⁷ The federal minister of environment and climate change has authority to issue such an order pursuant to subsection 9(1) of the *Impact Assessment Act*, S.C. 2019, c. 28, s. 1.

⁸ *Ermineskin Cree Nation v. Canada (Environment and Climate Change)* (2021), 2021 FC 758 (Fed.Ct.).

⁹ *Canada (Environment and Climate Change) v. Ermineskin Cree Nation* (2022), 2022 FCA 123 (Fed.C.A.).

¹⁰ *Rieger v. Plains Midstream Canada*, [2022 A.J. No. 125 (Alta. C.A.).

¹¹ *1688782 Ontario Inc. v. Maple Leaf Foods*, 2020 SCC 35 (S.C.C.).



Ruling on Saskatchewan Power Rates

In July 2022, the Government of Saskatchewan approved increases to SaskPower electricity rates of 4% effective September 1, 2022, and a further 4% effective April 1, 2023. The increases were based on [the recommendation](#) of the Saskatchewan Rate Review Panel (the “Panel”).

The Saskatchewan Process

The Panel is a purely advisory committee appointed “for the purpose of conducting reviews and providing opinions on the fairness and reasonableness of Crown corporation monopoly rate changes” proposed by SaskEnergy, SaskPower and SGI (OC 634/2018). This proceeding was convened at the order of the Minister of Crown Investments in February, 2022, with accompanying [terms of reference](#). Certain matters were treated as outside the Panel’s purview:

- The budgeted capital allocation, the rate base, and established corporate policies
- The targeted long-term Return on Equity of 8.5%
- The existing service levels
- Any existing supply contracts
- The revenue-to-revenue requirement ratio target range of 0.95 to 1.05

The Panel prescribed minimum filing requirements for SaskPower. Members of the public were invited to submit comments in writing and electronically. Two public meetings were convened where members of the public were invited to express comments. The Panel engaged consultant InterGroup to submit information requests to SaskPower, hold discussions with them, provide analysis to the Panel and assist in developing recommendations. The Panel summarized its findings and recommendations in a report to the Minister.

Highlights

The majority of SaskPower's electricity comes from natural gas generation, and increases in the market price of natural gas were cited as the primary reason for the rate increases. Other factors mentioned by the Panel included various increases to SaskPower's total revenue requirement, including operating, maintenance and administration costs.

The Panel cited factors that will impact future rates that customers may expect as decarbonization occurs:

- **Elimination of Coal Generation:** Government of Canada regulations effectively phase out coal power plants by 2029. SaskPower has retired Units 1 and 2 at its Boundary Dam facility and added carbon capture and storage to Unit 3. SaskPower must either replace all of its remaining coal power plants or convert them to carbon capture by 2030.
- **Net-Zero Grid:** The proposed federal Clean Electricity Standard will mandate a 2035 Net Zero electricity sector for the country. The target for the entire economy is 2050. This has led SaskPower to begin a complete refresh of its long-term system plan on the future of electricity generation in Saskatchewan.
- **Zero-Emission Vehicles:** The Government of Canada committed to a mandatory 100% zero-emission vehicles sold by 2035 for all new light-duty vehicles. SaskPower estimates there will be 34,000 electric vehicles in use in the province by 2032, adding more pressure on system demand.

- **Decarbonization Costs:** SaskPower must replace the capacity it is losing by retiring its fossil fuel power stations. It has been replacing coal energy with intermittent energy provided by green technologies such as wind and solar that is backed up with natural gas. If SaskPower must move away from natural gas generation sooner than expected, then it will require significant capital expenditures over the short to medium term.

Additional Recommendations

The Panel report included additional, non-binding recommendations. One of the recommendations is that SaskPower should prepare an Integrated Resource Plan to plan the physical resource requirements to serve its customers over the next couple of decades. The Panel recommends the plan be publicly available so that customers can make necessary plans and preparations to meet the net zero target by 2035.

BCUC Review of BC Hydro Integrated Resource Plan

During 2022, the exchange of information requests and responses took place as part of the review of BC Hydro's [Integrated Resource Plan](#) (the IRP) by the B.C. Utilities Commission (the BCUC).

Generation Resources

The IRP identifies a Base Resource Plan and Contingency Resource Plans, to ensure that BC Hydro has sufficient supply side, demand side, and transmission resources to reliably meet future power demands.

The Base Resource Plan assumes that BC Hydro will not need new energy resources until 2029, and will not need new capacity until 2032 (2027 on the South Coast). These numbers are conservative as they don't factor in the impact of demand side management programs, which could reduce energy and capacity needs. The IRP proposes a series of expanded DSM programs. Based on all of the factors, ***BC Hydro plans to acquire new energy starting in 2031 and capacity in 2038.***

These dates matter for independent power producers and First Nations in B.C. who are hoping to build new wind and solar projects.

The IRP includes Contingency Resource Plans in the event that actual load and resource outcomes vary from those assumed in the Base plan. There are scenarios where there could be accelerated demand for electricity because various sectors of the economy further electrify their operations in order to reduce GHG emissions.

THE REVIEW PROCESS

BC Hydro filed the IRP with the BCUC in December 2021. The BCUC filed 119 pages of Information Requests (IRs), and additional confidential IRs. Intervenors filed their own IRs. The utility has filed responses, and in some cases intervenors have requested additional answers.

Intervenor evidence is scheduled to be filed in January 2023. The public hearing is tentatively scheduled for April/May, 2023.

Are the GHG Assumptions Right?

The review of future generation requirements often involves debate about the correct assumptions to make, as these can drive the conclusions.

The Pembina Institute has [pointed out](#) that the base scenario in the IRP does not align with provincial climate goals. Although the draft IRP includes **contingency scenarios** where the assumption was made that load growth will increase to meet B.C. climate targets, the Institute recommends additional clarity and direction in **the base plan**. The implication is that new generation resources could be required in B.C. earlier than forecast in the IRP, in order to meet climate targets.

In December, [the BCUC wrote](#) to BC Hydro and FortisBC, requesting comments on six scenarios developed by the BCUC which assume that B.C. achieves various levels of success in achieving GHG reductions in coming years.

This discussion takes place in the context of the pending completion of BC Hydro's Site C hydroelectric project. As power from Site C comes online, new generation resources will not be required in B.C. for a number of years. The issue of just how many years, has implications for suppliers of new wind and solar projects. Many were disappointed by the 2019 cancellation of the *Standing Offer Program*, which encouraged the production of green power by IPPs.

The accuracy of the 2031 date for new energy will be tested at the hearing. IPPs and First Nations will be interested in the outcome.

EPA Renewals

In addition to its own generation, BC Hydro purchases power from a number of wind, solar and hydroelectric suppliers. Many of the electricity purchase agreements are set to expire over the next five years.

According to the IRP, BC Hydro will be offering to renew all of the expiring agreements at market-based prices (Section 7.4.2). A standard form of agreement will be used for renewals. The justification cited in the IRP is:

- Minimize potential cost impact on ratepayers
- Minimize electricity purchase agreement complexity and cost of electricity purchase agreement administration
- Minimize program complexity and cost of program implementation

In many cases, market-based prices could be considerably lower than the prices that were made available to developers to incent the construction of their projects. There will no doubt be debate about this policy approach at the hearing.

Time of Use Rates

BC Hydro plans to apply for approval of two new services and associated rates (Section 7.4.1.2):

1. A time of use rate for residential customers
2. A time of use rate for home charging of electric vehicles

Details will be included in coming rate applications.

With increasing numbers of electric vehicles on the road, stress on the electrical grid can be reduced by inducing customers to charge their vehicles at night instead of during peak consumption periods such as early evening.

Transmission Upgrades

BC Hydro's transmission function will be asked to initiate a long term planning study, to identify the system constraints and future growth opportunities of the bulk transmission system (Section 7.4.3).

Step one, which is expected to take 10 years, will involve upgrades to a number of 500 kV transmission lines and substations that serve the South Coast. There will also be "a significant 500 kilovolt project" that will be the subject of a future certificate of public convenience and necessity application.

U.S. Inflation Reduction Act – Impacts on Canadian Industry

A major United States energy act became law on August 16, 2022¹² (the “Act”). With an estimated total price tag over \$2 trillion and an estimated \$370 billion USD allocated to climate and energy-focused incentives, the Act represents the United States’ most extensive investment in climate solutions ever seen. Like many events that occur in the U.S., the Act will have an impact on its northern neighbour. The implications will be felt by various industries across Western Canada.

New Green Technology

The Act creates new incentives and tax breaks for solar, wind and other green technologies and expands many existing ones. For example, Section 13101 addresses “extension and modification of credit for electricity produced from certain renewable resources” and section 13103 addresses “increase in energy credit for solar and wind facilities placed in service in connection with low-income communities.” In addition to government spending, [it has been estimated](#) the Act will attract \$270 billion of investments in green energy projects.

This enormous investment may lead to the development of a new generation of green energy solutions and technologies, which Canadians will be able use to meet their climate goals.

Buy America

Draft versions of the Act contained tough “Buy America” provisions attached to incentives and tax breaks. As a result of lobbying by Canada and others, many provisions in the final version are now linked to suppliers from **either the U.S. or countries that have free trade agreements with the U.S.** Canadian exporters of goods and services may wish to confirm that their sector is protected.

Clean Vehicle Manufacturing

Section 13401 of the Act introduces changes to tax credits available to purchasers of clean vehicles. Consumers who purchase clean vehicles are eligible for tax credits up to \$7,500 USD. There are restrictions on what vehicle purchases will qualify. Credits will be available to purchasers of vehicles utilizing batteries that contain critical mineral elements extracted or possessed in a country with which the US has a free-trade agreement, or were from depleted batteries at a facility in North America. Another credit is available for vehicles containing battery components that were manufactured or assembled in North America. The Act also expands an existing tax credit by eliminating a previous restriction on the number of vehicles that can be purchased from an individual auto company.

Mining

The incentives for clean vehicles could also spark greater investment in Canadian minerals. The requirement that batteries possess minerals extracted from a country in which the US has a free-trade agreement means that car manufacturers will need choose their mineral sources wisely. Changes could also lead to more research and development efforts to advance battery-related technology in North America.

¹² Public Law 117-169, 136 Stat. 1919 (August 16, 2022), commonly called the *Inflation Reduction Act of 2022*.



Competing for Equipment

We may be hearing Ross Perot’s “giant sucking sound” as solar panels, wind turbines and other green energy supplies are drawn southwards to supply projects in the U.S. Canadian energy developers could face delays and shortages in the supply of materials.

For example, Section 13204 of the Act has created subsidies for the creation of clean hydrogen. This is expected to increase the demand for components needed to generate hydrogen power, such as turbines and electrolyzers. As the number of companies who supply these components is limited, there are likely to be supply chain issues.

Competing for Investment Dollars

It’s not just equipment at risk of heading southwards. The Business Council of Canada told a parliamentary committee¹³ that the Act will attract investment dollars in the green energy sector and could cause a significant shift in North American trade flows. They noted that a company with operations in the U.S. and Canada will invest where conditions are favourable and certain. Another presenter made the same point, and said the Act will make the U.S. the world’s leading buyer of carbon as a result of favourable financial credits for carbon capture and a simple, practical mechanism in the Act to convert carbon credits to cash.

Presenters urged the federal government to revise its programs for green technology to provide both more dollars, and greater certainty, in order for investments in Canada to be competitive.

¹³ Standing Committee on International Trade, resolution on “Impacts of the Inflation Reduction Act on Firms and Workers in Canada”, hearing November 18, 2022.

The Takeaway from 2022 – From Small Beginnings

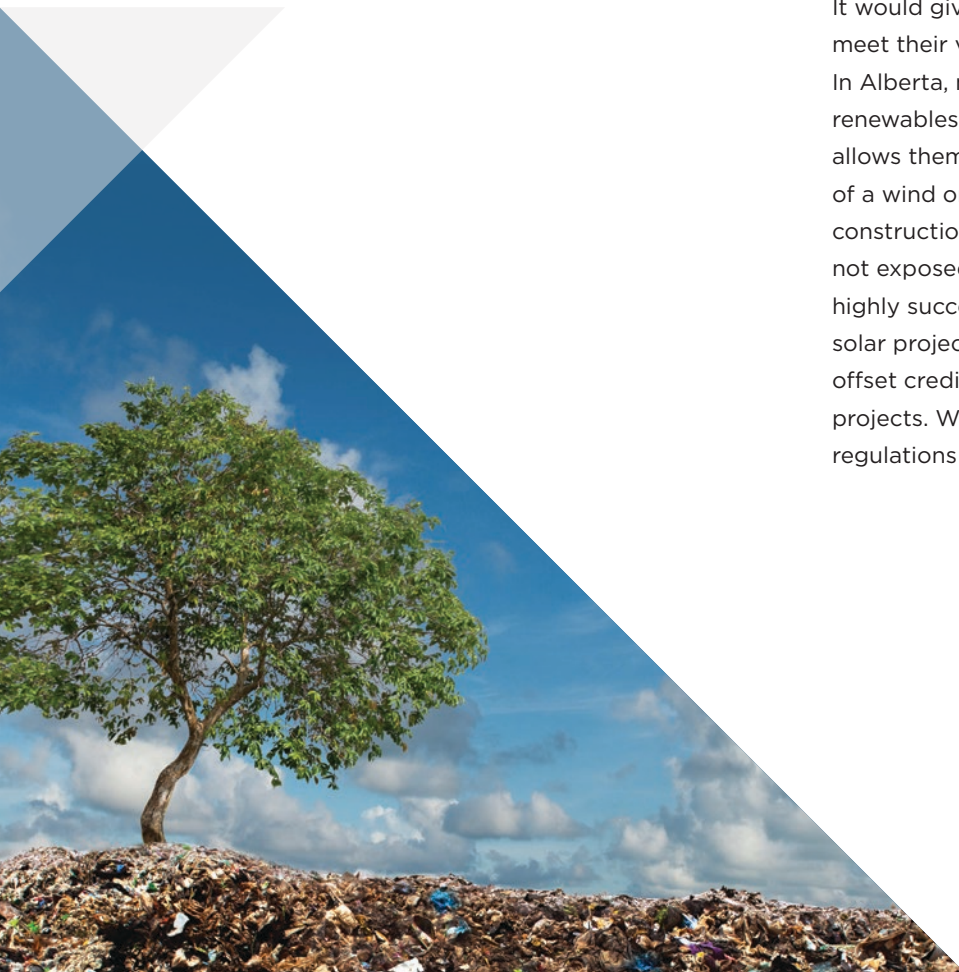
A federal framework for the trading of carbon offset credits has been a topic of discussion for a long time. That discussion turned to action in 2022 with the creation of federal credits for eliminating carbon emissions from landfills (see *Launch of Canada's Carbon Offset Trading Market*).

Landfills are a Small Beginning

The next big step would be federal credits for carbon capture, use and sequestration (“CCUS”), and many believe CCUS projects will take off in Canada once federal offsets are available for them. A robust market for trading carbon offset credits, which facilitates carbon reduction measures such as CCUS, could become a key element in Canada's transition to net zero.

Commentators are applauding one aspect of the U.S. energy legislation that was passed this year, a “**simple, practical mechanism**” allowing developers to extract value from their carbon credits (see *The U.S. Inflation Reduction Act*). A simple, practical mechanism is more than a small detail.

If the carbon reduction benefits of a CCUS project can be monetized and traded as credits, then every company in the country becomes a potential customer. It would give companies another viable option to meet their voluntary and mandatory carbon targets. In Alberta, many companies are jumping into the renewables market, given a market structure that allows them to purchase the environmental attributes of a wind or solar project without being exposed to construction/operational risk, while the developer is not exposed to market price risk. This framework was highly successful in 2022 in inciting new wind and solar projects in Alberta. If this is done right, federal offset credits could spark a similar uptake in CCUS projects. We will all be waiting with interest for federal regulations to make it happen.



About the MLT Aikins Energy Group

Energy is evolving. That change is being driven forward by hard-working and innovative people like you. MLT Aikins has been part of this industry from the beginning. We understand the political, economic and legal issues involved at each stage of an energy transaction or the development of an energy project. We understand energy and we understand your business.

Our integrated energy practice team brings together skills and knowledge from some of Western Canada's top corporate/commercial, Indigenous, M&A, finance, regulatory and environmental lawyers to drive your project or transaction forward to completion or close.

Our energy team advises owners, producers, operators, developers, contractors, suppliers, financiers and other stakeholders on all aspects of energy projects or transactions. We leverage our broad experience and depth of relationships to lead you through the challenges involved in energy projects and transactions in Canada.

Renewable Energy

MLT Aikins advises clients on renewable energy projects and transactions in Canada. Our mandates include land acquisitions and the development, financing, construction, commercialization and acquisition/divestment of utility-scale wind, solar, geothermal, biomass and hydroelectric projects.

MLT Aikins acts for both independent power producers (IPPs) and utilities, depending on the project or transaction, which uniquely positions us to best serve our renewable energy clients. We have also acted for contractors, suppliers and landowners on numerous energy projects and transactions. Through our leading Indigenous practice, we regularly and increasingly act for First Nation renewable energy developers, owners and stakeholders – by way of equity, royalty or other form of participation.

Wind

We have acted as legal counsel for developers and First Nations as well as utilities, lenders, contractors, landowners and municipalities on a number of wind projects and transactions in Western Canada. For all clients, our team of energy lawyers employ project management tools to manage and complete the work you need done on time and on budget.

Developers: We advise developers on structuring your wind project to meet local requirements in Western Canada and to engage or partner with First Nations. We regularly advise on procurement processes, including advice on power purchase agreements (PPAs). Our lawyers can assist with site acquisition and all real estate and land issues with your wind power project. We assist developers with EPC or other contractor construction contracts and advise on turbine supply agreements with suppliers. We also advise developers on all agreements with municipalities, such as road maintenance agreements.

First Nations: We act for First Nations and other Indigenous economic organizations in structuring equity ownership and other forms of participation in utility-scale wind farm projects together with other developers. We also act for First Nations and other Indigenous economic organizations who own and operate independent development organizations, and advise them on developing their wind projects. Our work extends to advising on community-owned or small, community-based wind projects, sometimes in remote locations. We have successfully negotiated agreements with the Crown for development of wind projects and have advised on agreements between nations and municipal entities.

Utilities: We act for utilities in structuring and running procurement processes such as requests for proposals (RFPs) and PPAs. We have been involved in the planning and development of world-class, leading-edge clean energy projects, providing legal, strategic and dispute resolution advice at all stages of the projects. We have been called on to draft and update templates such as PPAs. Our energy lawyers also advise utilities in Western Canada on a broad range of regulatory matters.

Lenders: The transactions lawyers on our energy team often act for domestic lenders financing wind projects. We also undertake due diligence assignments on wind assets for lenders and investors from outside Canada.

Contractors: We have acted for equipment suppliers on turbine supply agreements and for contractors on EPC contracts for wind farm projects.

Landowners: We have also acted groups of landowners in connection with utility-scale energy projects in Western Canada, most often to negotiate option and lease agreements.

Municipalities: Our firm is long-standing counsel to various levels of government across Western Canada, and we have acted for municipal entities to establish agreements related to road and maintenance or to establish bylaws related to wind farm development.

Solar

We have worked with developers, First Nations and other Indigenous economic organizations, consultants, lenders, contractors and owners and operators on solar projects, advising on both commercial and regulatory matters. We have in-depth understanding of commercial and regulatory regimes and can provide you with innovative solutions to see your project through to completion.

Our energy team has deep knowledge of the structuring and development of solar energy projects and we advise on land acquisitions and on the development, financing, construction, investments and transactions of such projects. We have particular skill and experience in advising First Nations and other Indigenous economic

organizations on developing their own solar projects and assisting with building the Nations' capacity as project developers.

We have acted on behalf of different project stakeholders on solar projects of all sizes, ranging from large utility-scale projects to residential rooftop projects.

Geothermal

As interest grows in the vast, untapped potential for producing energy from underground thermal resources across Western Canada, energy companies and developers face many challenges that are unique to geothermal energy.

Our team draws on our experience working with both geothermal developers and other energy producers to advise on project financing, joint development agreements, construction, structuring contracts, due diligence and navigating regulatory requirements.

We have experience structuring various key contracts as they relate to geothermal projects, including:

- Power purchase agreements
- Subsurface leases
- Surface leases
- Engineering, procurement and construction contracts
- Biomass/Biogas/Biofuel

We have a deep understanding of the legal issues surrounding the biomass industry and provide innovative solutions to our clients, advising on the practical business and technical aspects of their projects.

Our energy team has experience advising on different types of biomass projects – ranging from traditional biomass to power projects at forestry facilities to biomass-to-liquid fuel oil and cellulosic ethanol projects. We have acted as counsel to multinational developers on utility-scale biomass power projects in Saskatchewan and Alberta.

We advised a Canadian developer on projects for baseload electricity generation using biomass fuel sources in remote, off-grid First Nation communities across Canada. We have also acted for Indigenous-

owned groups to assist in exploration and development of their biomass projects in their home communities in Northern Canada. We have also advised First Nations and other Indigenous economic organizations on equity ownership and royalties in biomass projects.

We have worked with project developers advising on financing, procurement, construction and operating matters in the development of biomass projects, particularly in projects generating energy from waste forest products.

We have worked with biogas and biofuel companies advising on matters related to financing, procurement and engineering, and assist with structuring service and utility agreements and permitting and compliance.

Hydroelectric

We recognize that developing hydroelectric power projects consistent with the public interest requires a multi-disciplinary approach. We have extensive experience advising clients on all aspects of hydroelectric projects, including financing, acquisition, licensing, regulatory and development matters. We can assist with structuring a broad range of agreements such as:

- Joint venture/partnership agreements
- Input purchase agreements
- Power purchase agreements
- EPC/EPCM contracts for infrastructure development
- Ancillary agreements
- Transportation and shipping agreements
- Technology and licensing agreements
- Retail agreements

We have advised on a range of substantive issues, including environmental impacts and mitigation, power supply, water supply, recreation, preservation, shoreline uses and management and economic development. Our lawyers represent utilities and their operating subsidiaries in regulatory proceedings before various courts and regulatory boards. We bring a strategic and practical approach to navigating complex regulatory issues.

Electricity Grids

We have provided counsel on the construction of major HVDC transmission lines and converter stations as well as AC lines. We have experience advising on open access transmission tariffs, electricity reliability standards and coordination arrangements between utilities and with the United States. We have dealt with the operation of energy markets and compliance programs for market rules. Our lawyers represent utilities and others at rate hearings and many other federal and provincial regulatory proceedings.

Carbon Capture, Utilization and Storage

We have in-depth knowledge of carbon capture, utilization and storage (CCUS) technologies and have advised on some of Western Canada's major carbon capture projects. Our lawyers actively follow developments in the sector and are involved in a broad range of work as it relates to capture, utilization and storage, including advising on regulatory and compliance issues. We have experience helping industry partners structure a variety of key contracts including:

- Joint venture/partnership agreements
- Project financing agreements
- EPC/EPCM contracts for infrastructure development
- Connection, transportation and shipping agreements
- Offtake/sales agreements to sell CO₂ for enhanced oil recovery
- Storage/sequestration agreements

Nuclear

Our lawyers have been exploring the opportunities and obstacles involved in nuclear power generation in Canada for more than a decade. We have a unique understanding of the “political” dynamics and regulatory hurdles that industry participants face in the current business landscape. We help clients address the regulatory, commercial and construction considerations within the nuclear sector. We advise on various matters relating to the construction and operation of nuclear facilities; regulation of the distribution, sale and consumption of nuclear energy; disposal of nuclear waste; and in disputes relating to these matters.

We also have experience advising clients on small modular reactors (“SMRs”), a promising new technology that could play an important role in the transition to clean energy systems and a low-carbon future.

Natural Gas Power Generation

Our energy lawyers assist a range of clients with the development, construction, financing and operation of gas power generation and transmission assets. In particular, we advise on power purchase contracts, project procurement, the purchase and sale of ancillary services, the development and implementation of operating rules and codes of conduct and the acquisition and divestment of gas power generation assets. We have also acted on numerous regulatory applications and have provided advice on compliance, rate applications and reviews, cost of capital issues, rate unbundling and dispute resolution related to gas power generation.

Carbon Markets & Regulatory Issues

For nearly a decade, lawyers on our energy team have been writing and presenting on the development of The Management and Reduction of Greenhouse Gases Act in Saskatchewan and the Emission Offset System in Alberta. Our team has deep experience advising both public and private clients on most aspects of regulatory compliance.

Our extensive experience with environmental law issues derives from our work with diverse industries including carbon capture and storage. We have

provided environmental impact assessment, liability and due diligence advice. Our work in the area also involves advising on contaminated sites liabilities, site remediation and transporting hazardous materials.

We have experience advising Crown corporations and mining companies on the operation of all aspects of the federal Greenhouse Gas Pollution Pricing Act and The Management and Reduction of Greenhouse Gases Act. This advice extends to the federal fuel charge and the operation of both the federal and provincial output-based pricing systems.

Our work in this area includes drafting project plans, agreements and related provisions for the acquisition, ownership and sale of carbon credits and offsets.

Clean Technology

We have experience advising clean technology developers, manufacturers and suppliers on low carbon energy projects aimed at reducing carbon emissions and reaching emissions targets. We help industry participants in the clean-tech sector navigate the legal hurdles they face in pursuit of developing, selling, operating and maintaining technology that reduces carbon emissions.

MLT Aikins can help navigate climate change law and regulations at the provincial and federal levels to maximize the value for our clients and capitalize on developments in carbon markets and trading schemes.

Battery Storage

Our lawyers have also advised project owners on a number of battery storage projects in Ontario at pharmaceutical, food production and health-care facilities. We also advise battery manufacturers on commercial matters.

Flare Gas

Our energy team advises flare gas project owners on development of their flare gas projects, including power purchase agreements and First Nations’ and other Indigenous economic organizations’ involvement.



Oil & Gas

MLT Aikins has extensive experience advising the oil and gas industry on issues related to exploration, development, production, processing, handling, storage, transportation, distribution and wholesale/retail marketing of both crude and refined petroleum products.

Our experience includes extensive work in the upstream oil and gas sector, including on: the acquisition, operation and divestiture of on-shore and off-shore exploration and production assets; land matters, including in respect of surface/mineral rights; farm-in, farm-out and royalty arrangements; and joint operations. We have advised on several significant projects, including the Hibernia project.

We additionally advise midstream oil and gas clients on various matters, including advising pipeline companies and shippers on product transportation issues, and on acquisitions, divestitures, development, construction and financing of pipeline projects. Our firm has advised on the acquisition, divestiture, development, construction and financing of several significant pipeline projects, including the Alliance, Express, Keystone, Producers and Trans-Canada systems. We provide advice on the regulation and deregulation of assets and markets in Western Canada, including rate applications, cost of capital issues, codes of conduct and rate unbundling. We additionally represent both landowners and industry in hearings to resolve surface rights disputes.

Our firm advises downstream oil and gas clients on a variety of matters, including acquisitions and divestitures, project development, construction and financing and on matters relating to operations, wholesale/retail fuel supply and dealer arrangements. We have advised on several significant downstream projects, including the Lloydminster heavy oil upgrader and the CO-OP refinery and upgrader in Regina.

About the Authors



Jessica Buhler

Jessica advises clients on environmental and Aboriginal law matters. Jessica acts for proponents, Indigenous communities, municipalities and landowners navigating project-based permitting and environmental assessment processes. Jessica also advises on matters relating to the duty to consult.



Conor Chell

Conor is head of the MLT Aikins ESG practice group and one of the leading ESG lawyers in Canada. He has extensive experience in the development and implementation of ESG programs, strategies and risk management. Conor acts for a broad spectrum of clients in the energy, Indigenous, mining and natural resources, agribusiness and financial services industries, among others.



Rangi Jeerakathil

Rangi practises in the areas of environmental, energy and Aboriginal law, including corporate social responsibility. He has advised proponents extensively on permitting for industrial projects, including mining projects, and in project decommissioning. Rangi has advised on the environmental and regulatory components of uranium mining and nuclear generation projects. He advises clients on regulatory issues in de-regulated and regulated natural gas and electricity industries.



Meghan Johnson

Meghan is an articling student based in the firm's Saskatoon office. Meghan obtained her Juris Doctor from the University of Saskatchewan in 2022. Prior to entering law, she earned a Bachelor of Commerce, majoring in human resources. Before joining MLT Aikins, Meghan spent a summer working at the Senate of Canada, where she gained experience in federal legislation and policy development and assisted in the proposal and drafting of amendments.



Erica Klassen

Erica maintains a general litigation practice. Erica also advises on regulatory and Aboriginal law matters. Erica has experience with a variety of regulatory matters, including occupational health and safety, permitting and environmental matters. She also has experience with matters related to the duty to consult. Erica has appeared before the Saskatchewan Court of Queen's Bench and Provincial Court of Saskatchewan.



Deron Kuski

Deron practises broadly in the area of litigation which extends to commercial litigation, construction litigation, constitutional law and all aspects of creditor and commercial leasing law. Deron has significant experience representing a broad range of clients including owners, consultants and contractors on issues related to power plants, pipelines, processing facilities, recreational facilities, office buildings, residential and commercial developments, landlords, crown corporations, business owners and shareholders in disputes and many other major construction projects.



Scott Masson

Scott maintains a broad corporate practice, with a focus on project planning and development, infrastructure, construction procurement and real estate matters. Scott frequently assists clients in a variety of industries with the development, drafting and negotiation of contracts for construction projects and the procurement of goods and services (including professional services).



Chris Nyberg

Chris's practice focuses on transactional and commercial matters, including mergers and acquisitions, corporate finance and complex commercial transactions for start-up and mid-market companies in technology, food, beverage and agribusiness, healthcare and other regulated industries. He has broad experience with a range of private equity, venture capital and other institutional investments as well as complex acquisitions, mergers, divestitures, minority investments, and cross-border transactions.



Laura Roberts

Laura is an ESG Specialist with more than 20 years of experience in regulatory approvals, environmental assessment, compliance and sustainability reporting. She has extensive experience consulting with external stakeholders including Indigenous communities, environmental non-government organizations, community organizations, academics and industry groups.



Esha Saxena

Esha maintains a general corporate/commercial law practice, with particular focus on securities, ESG, energy, technology and intellectual property. Esha has experience assisting clients with completing private placements, developing ESG strategies, navigating energy regulations, protecting intellectual property rights, and advising on various other commercial transactions and corporate governance matters.



Ken Tennenhouse

With decades of legal experience in the power sector, Ken provides strategic advice on major capital projects and green energy. Ken provides clients a wealth of strategic legal advice on energy and green energy in Western Canada, including commercial transactions and major construction projects. His broad range of experience includes contract structuring and drafting, tendering law and other key aspects of construction projects.



Julie Ward

Julie maintains a general litigation practice with particular focus on commercial litigation, IP litigation, construction litigation as well as labour and employment and administrative law. During law school, Julie gained unique insights into effective advocacy before administrative tribunals as an intern at both the Alberta Human Rights Commission of Alberta and Alberta Utilities Commission.



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