

RECENT LEGISLATIVE AND REGULATORY DEVELOPMENTS OF INTEREST TO ENERGY LAWYERS

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This article looks at several legislative and regulatory developments, primarily from April 2022 to March 2023, that may be of interest to energy lawyers, providing a high-level overview on topics including: (1) policy, legislation, and regulations aimed at continuing federal and provincial decarbonization efforts; (2) regulatory developments impacting power, hydrogen, and oil and gas pipelines; (3) consideration of cumulative impacts in duty to consult cases; (4) expansion of Indigenous-owned energy projects alongside progression in the implementation of UNDRIP across Canada; (5) jurisdictional disputes between the federal and provincial governments (for example, considerations regarding the Impact Assessment Act and Alberta Sovereignty Act); and (6) clarification of the application of the post-Vavilov standard of review.

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I. INTRODUCTION

This article provides an overview of recent regulatory and legislative developments of interest to Canadian energy lawyers from April 2022 to March 2023. It includes discussions of recent regulatory decisions and related judicial decisions, as well as changes to regulatory and legislative regimes impacting energy law. This article will also discuss and comment on

a number of ongoing regulatory and legislative developments to watch for in the coming year. Topics discussed include the opportunities and challenges posed by decarbonization and the ongoing energy transition, cumulative effects, Aboriginal law and Indigenous partnerships, and other natural resources and electricity-related developments. This article covers updates across Canada — while many of the updates are from federal or western provincial jurisdictions, it also covers decarbonization and transmission in Ontario, Quebec, and the Atlantic provinces.

II. CLIMATE CHANGE AND DECARBONIZATION

In 2022 and early 2023, federal and provincial governments have taken aggressive measures to reduce carbon emissions.¹ Both levels of government have taken concrete steps in an effort to expedite the deployment of emerging technologies, such as small modular reactors, and to meet Canada’s ambitious greenhouse gas emission reduction targets.² In addition to announcing several funding initiatives to incentivize the development of renewable electricity generation, new federal and provincial regulations have been issued to support a net-zero electricity grid by 2030.

A. FEDERAL EMISSIONS REDUCTION PLAN 2030

On 29 March 2022, the Government of Canada released the “2030 Emissions Reduction Plan: Canada’s Next Steps for Clean Air and a Strong Economy” under the *Canadian Net-Zero Emissions Accountability Act*³ — the first of a series of greenhouse gas (GHG) reduction plans.⁴ It sets a target of cutting GHG by 40 to 45 percent below 2005 levels by 2030.⁵ The first *ERP* progress report is expected to be available in late 2023.

B. CLEAN ELECTRICITY REGULATIONS

The *Clean Electricity Regulations*,⁶ previously known as Clean Electricity Standard, are an integral part of Canada’s goal of cutting GHG by 40 to 45 percent below 2005 levels by 2030 and net-zero emissions by 2050.⁷ Although 82 percent of Canada’s electricity does not emit GHG, it is still a substantial source of emissions.⁸ To aid with the development of the *Clean Electricity Regulations*, the Minister of Environment and Climate Change released a second engagement document, “Proposed Frame for the Clean Electricity Regulations,” on 26 July 2022 to invite interested stakeholders and key parties to provide their feedback.⁹ The *Clean Electricity Regulations* were expected to be published by the end of 2022; however, they are now not expected to be available until sometime in 2023.

¹ See e.g. Environment and Climate Change Canada, *2030 Emissions Reduction Plan: Canada’s Next Steps for Clean Air and a Strong Economy* (Gatineau: ECCC, 2022), online: [perma.cc/6TVB-YGPP] [*ERP*]; *Technology Innovation and Emissions Reduction Regulation*, Alta Reg 133/2019 [*TIER*].

² *ERP*, *ibid.*

³ *Canadian Net-Zero Emissions Accountability Act*, SC 2021, c 22.

⁴ *ERP*, *supra* note 1.

⁵ *Ibid* at 7.

⁶ *Clean Energy Regulations*, (2023) C Gaz 1, 2709 (Draft).

⁷ *ERP*, *supra* note 1 at 40.

⁸ *Ibid* at 82–83.

⁹ Environment and Climate Change Canada, *Proposed Frame for the Clean Electricity Regulations*, (Canadian Environmental Protection Act Registry: Publications) (Gatineau: ECCC, 26 July 2022), online: [perma.cc/8XQE-6ZEY].

C. FEDERAL CLEAN FUEL REGULATIONS

On 21 June 2022, the Government of Canada released the *Clean Fuel Regulations*, which set strict requirements on producers and importers of liquid fossil fuels, such as gasoline and diesel, to reduce the carbon intensity (CI) of these fuels.¹⁰ The *CFR* also establish a credit market, which is intended to create a market shift towards low CI fuels and projects that fit within the *CFR* compliance categories.¹¹ The Government of Canada projects the *CFR* will help cut 26.6 million tonnes of GHG by 2030.¹² The compliance obligations under the *CFR* take effect on 1 July 2023, with the first annual CI limits being 91.5 grams of carbon dioxide equivalent per megajoule of energy (gCO₂e/MJ) for gasoline and 89.5 gCO₂e/MJ for diesel.¹³ Reduction requirements will increase by 1.5 gCO₂e/MJ each year until 2030, when they will reach 81 gCO₂e/MJ and 79 gCO₂e/MJ for gasoline and diesel respectively.¹⁴

D. ALBERTA TECHNOLOGY INNOVATION AND EMISSIONS REDUCTION REGULATION

The *Technology Innovation and Emissions Reduction Regulation* governs Alberta's industrial GHG emissions pricing and emissions trading system.¹⁵ *TIER* applies to large emitters and opt-in facilities, requiring them to reduce emissions to meet facility benchmarks and find innovative ways to invest in clean technology. On 14 December 2022, Alberta's Minister of Energy released an Order in Council to amend the *TIER*,¹⁶ which will bring the *TIER* regime in line with minimum federal stringency standards, ensuring the carbon pricing system receives an exemption to the federal fuel charge under the *Greenhouse Gas Pollution Pricing Act*.¹⁷ In addition, some of the other key changes introduced in this amendment include: (1) an increase in *TIER* fund price; (2) the creation of carbon capture, utilization, and storage (CCUS) credits; (3) credit expiration for emission performance credits and offset; (4) a limit on emission performance credits, offsets, or sequestration credits; and (5) a 2 percent annual tightening rate on facility-specific benchmarks and high performance benchmarks.¹⁸ Although the creation of the credit system under *TIER* has generally been well-received, there is an emerging concern that a significant number of credits may be generated from large emitters that will ultimately flood the market. The resulting impact will be a reduction in value of the credits to CCUS projects.

¹⁰ *Clean Fuel Regulations*, SOR/2022-140 [*CFR*].

¹¹ *Ibid.*

¹² Environment and Climate Change Canada, *Government of Canada Supports Innovation in the Fuel Industry with Final Clean Fuel Regulations* (News Release) (Gatineau: ECCC, 29 June 2022), online: [perma.cc/5H9N-2MRX].

¹³ *CFR*, *supra* note 10, s 5(1).

¹⁴ *Ibid.*

¹⁵ *TIER*, *supra* note 1.

¹⁶ *Technology Innovation and Emissions Reduction Amendment Regulation*, Alta Reg 251/2022 [*TIER Amendment*].

¹⁷ *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186.

¹⁸ *TIER Amendment*, *supra* note 16.

E. BRITISH COLUMBIA *LOW CARBON FUELS ACT*

The Government of British Columbia passed the new *Low Carbon Fuels Act*¹⁹ to replace the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*.²⁰ The *Low Carbon Fuels Act* will come into force 1 January 2024. It is intended to enable more GHG reduction and make low carbon fuel standards easier to understand, administer, and enforce. Proposed new regulations to align with the *Low Carbon Fuels Act* are expected to be introduced in 2023. Some of the key changes under the *Low Carbon Fuels Act* include making all fossil-derived transportation fuels supplied in British Columbia subject to CI requirements and allowing access to fuel credits and trading to persons other than fuel suppliers.²¹

F. FEDERAL CANADIAN GREENHOUSE GAS OFFSET CREDIT SYSTEM REGULATIONS

On 8 June 2022, the Government of Canada released the *Canadian Greenhouse Gas Offset Credit System Regulations*, which launched Canada's Greenhouse Gas Offset Credit System (Credit System).²² The Credit System was created to encourage businesses, communities, and industries to undertake projects that promote innovative strategies to reduce GHG emissions and, ultimately, to remove GHGs from the atmosphere. Participants under the Credit System must be registered, and such reductions and removals of GHGs must come from activities that do not fall under an existing law or existing carbon pricing system.²³ Offset credits can be sold and traded on the market. The first protocol that allows for generation of offset credits is the *Landfill Methane Recovery and Destruction* protocol for which landfill operators can receive offset credits if they obtain landfill gas and destroy it or use it.²⁴ There are additional protocols under development for other areas including refrigeration, agricultural, forest management, direct air carbon capture, and sequestration.

G. LONG-TERM OUTLOOK ON ELECTRICITY SUPPLY

Electricity market operators and other organizations across Canada have published their long-term forecasts for electricity supply and demand.²⁵ The forecasts anticipate increased electricity needs and a broader range of electricity supply options as more energy production materializes. The forecasts consider increased electricity demands from emerging areas, such as CCUS, but also an increased desire by consumers for cleaner forms of energy.²⁶ The

¹⁹ Bill 15, *Low Carbon Fuels Act*, 3rd Sess, 42nd Parl, 2022 (assented to 2 June 2022). This bill has not yet come into force.

²⁰ *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*, SBC 2008, c 16.

²¹ *Ibid.*

²² *Canadian Greenhouse Gas Offset Credit System Regulations*, SOR/2022-111.

²³ *Ibid.*, ss 7–8.

²⁴ Environment and Climate Change Canada, *Federal Offset Protocol: Landfill Methane Recovery and Destruction*, version 1.0 (Gatineau: ECCC, 8 June 2022), online: [perma.cc/Q75S-TDF7].

²⁵ Ontario, Independent Electricity System Operator, *Annual Planning Outlook, Ontario's Electricity System Needs: 2024-2043* (Toronto: IESO, 28 December 2022) at 16, 48, online: [perma.cc/BC3G-8ZW5]; Alberta Electric System Operator, *AESO Net-Zero Emissions Pathways Report* (Calgary: AESO, 27 June 2022) at 6, online: [perma.cc/3P4U-XP3] [AESO, *Net-Zero Emissions Report*]. We anticipate that the Canada Energy Regulator will soon issue Canada's Energy Future 2023, a report that analyzes and provides data on all energy commodities for all Canadian provinces and territories.

²⁶ AESO, *Net-Zero Emissions Report*, *ibid.*

Independent Electricity System Operator's (IESO) forecast illustrates a strong and steady growth of electricity demand through the end of the 2030s. This anticipated growth is fueled by industrial sector development in the mid-2020s in mining, steel, electric vehicle (EV) battery, and hydrogen production.²⁷ The Alberta Electric System Operator's (AESO) forecast emphasized the need for a robust transmission system and highlighted the critical role of energy storage to ensure supply adequacy given the high penetration of renewables into the grid.²⁸ The AESO anticipates that transitioning to a net-zero future "will require an additional \$44 to \$52 billion in generation capital investments (including a return on investment), generation operating costs and in transmission system revenue requirements from 2022–2041."²⁹

III. POWER

Driven by Canada's commitment to achieve net-zero electricity by 2030, Canadian provinces are interested in diversifying their electricity portfolios and are looking into all potential alternatives to reduce carbon emissions. Areas of great interest in 2022 include Alberta's large geothermal resource potential and opportunities for regional transmission initiatives, such as the Atlantic Loop, to maximize the flow of clean electricity between provinces. The interest in energy storage and CCUS technologies grew considerably in 2022 and remains a topic of high interest in 2023. Although in 2022 several proposed electricity transmission projects were approved, provinces continue to grapple with the ever-growing concern of meeting future electricity capacity needs while ensuring electricity affordability.

A. NUCLEAR

Nuclear power is considered a large potential source of clean power. In 2022, small modular reactors (SMRs) continued to attract the interest of industry and provincial governments given their desirable attributes. For example, they are clean, easy to deploy, and scalable to suit specific needs. The Government of Alberta, particularly, views SMRs as a viable technology to decarbonize its oil and gas industry. On 28 March 2022, the governments of Ontario, Saskatchewan, New Brunswick, and Alberta agreed to a joint strategic plan outlining the path forward on SMRs.³⁰ The provinces' strategic plan identified five key priority areas for SMR development and deployment, including positioning Canada as an exporter of SMR technology and creating opportunities for participation from Indigenous communities and public engagement.³¹ Significantly, 2022 was also marked by several funding commitments and development announcements in this area, including the federal government announcement of \$9.1 billion in new investments as part of the *ERP*.³² The growing interest for this technology has, not surprisingly, increased the pressure posed by stakeholders on the applicable regulator, the Canadian Nuclear Safety Commission, to streamline the approval and construction process for SMRs.³³

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.* at 6.

³⁰ Ontario, New Brunswick, Alberta & Saskatchewan, *A Strategic Plan for the Deployment of Small Modular Reactors* (2 March 2022), online: [perma.cc/S396-E6UH] [*SMR Plan*].

³¹ *Ibid.* at 3–6.

³² *ERP*, *supra* note 1 at 7.

³³ *SMR Plan*, *supra* note 30 at 12.

B. GEOTHERMAL

Geothermal energy is heat originating from below the Earth's surface that can be used for generating clean electricity. Geothermal energy represents a reliable source of electricity that complements wind and solar electricity generation.

On 15 August 2022, the *Geothermal Resource Development Rules* and *Directive 089: Geothermal Resource Development* came into effect to complete the regulatory framework for geothermal resource development in Alberta.³⁴ The *Geothermal Rules* introduce obligations and processes for geothermal energy development, including licence eligibility requirements.³⁵ *Directive 089* specifically provides: (1) Alberta Energy Regulator (AER) approval is required for all geothermal development activities (except site surveying); (2) geothermal licence holders are subject to the AER's comprehensive liability assessment regime; (3) geothermal developments must be reclaimed prior to closure pursuant to AER's *Directive 020: Well Abandonment*;³⁶ and (4) the *Surface Rights Act*³⁷ does not apply to geothermal resource development, imposing on project proponents the requirement to enter into an agreement directly with landowners whose property is impacted by the geothermal development.³⁸ Geothermal energy is seen as an alternative to conventional fossil fuels to provide heat and energy and is another key aspect of the Province of Alberta's net-zero goals.

C. TRANSMISSION

The Atlantic Loop is a proposed multi-billion-dollar project that would connect the four Atlantic Provinces — Nova Scotia, New Brunswick, Prince Edward Island, and Newfoundland and Labrador — to hydroelectricity from Quebec and Newfoundland and Labrador.³⁹ The proposal includes overhead power lines with capacity to carry 1,150 megawatt hours (MWh).⁴⁰ In the 2023 Federal Budget, the federal government committed to advancing the Atlantic Loop and indicated being in negotiations with provinces and utilities to identify a clear path to deliver it by 2030.⁴¹ On 11 October 2023, the Government of Nova Scotia announced its intention to withdraw from the Atlantic Loop, citing the project's prohibitively high construction costs and the desire to pivot to renewable sources of energy.⁴²

³⁴ *Geothermal Resources Development Rules*, Alta Reg 116/2022 [*Geothermal Rules*]; Alberta Energy Regulator, *Directive 089: Geothermal Resource Development* (Calgary: AER, 15 August 2022), online: [perma.cc/97QR-EKWM] [*Directive 089*]. The Government of Alberta had previously proclaimed, on 7 December 2021, the *Geothermal Resource Development Act*, SA 2020, c G-5.5.

³⁵ *Geothermal Rules*, *ibid*.

³⁶ Alberta Energy Regulator, *Directive 020: Well Abandonment* (Calgary: AER, 19 October 2022), online: [perma.cc/97B5-B67Z].

³⁷ RSA 2000, c S-24.

³⁸ *Directive 089*, *supra* note 34.

³⁹ Natural Resources Canada & Nova Scotia Department of Intergovernmental Affairs, *Final Report: Clean Roadmap for Atlantic Canada* (Ottawa: Clean Power Planning Committee, 16 March 2022), online: [perma.cc/42N6-XTQK]. This report provides an overview of prospects for the Atlantic Loop in section 2 (*ibid* at 9–12).

⁴⁰ *Ibid* at 12.

⁴¹ Department of Finance Canada, *Budget 2023, A Made-In-Canada Plan: Strong Middle Class, Affordable Economy, Healthy Future*, Catalogue No 1719-7740 (Ottawa: Department of Finance Canada, 2023) at 81, online: [perma.cc/CP3S-V2L8].

⁴² Paul Withers, "N.S. Abandons Atlantic Loop, Will Increase Wind and Solar Energy Projects for Green Electricity," *CBC News* (11 October 2023), online: [perma.cc/M7KE-2TXE].

On 30 September 2019, Hydro-Québec TransÉnergie (HQT) applied to the Canada Energy Regulator (CER) to construct and operate a 103 kilometre power line between the Appalaches Substation and a crossing point on the Canada-United States border — the Appalaches–Maine Interconnection Line Project (HQT Project).⁴³ The CER issued a permit for the HQT Project, subject to several conditions, to ensure protection of the environment.⁴⁴ Once the HQT Project is completed, it will increase the exchange capacity between Quebec and New England by 1,200 megawatts and supply Massachusetts with 9.45 terawatt hours of clean hydropower annually for 20 years.⁴⁵

The Hydro One Project in Ontario consists of a new, approximately 49 kilometre long, 230 kilovolt (kV) double-circuit transmission line.⁴⁶ It had been designated as a priority project by a Provincial Order in Council, and therefore, the Ontario Energy Board (OEB) was to accept it when needed when considering whether to grant Hydro One Networks Inc.’s (Hydro One) leave for construction.⁴⁷ On 24 November 2022, the OEB issued a decision granting Hydro One’s request for leave to construct a double-circuit transmission line and associated station facilities in the municipalities of Chatham-Kent and Lakeshore, and the County of Essex (the Hydro One Project).⁴⁸ The Hydro One Project is one of several projects intended to accommodate growing demand in southwestern Ontario and to improve the power supply reliability for customers in the Windsor-Essex region.

Hydro One plans to develop four new transmission line projects, two of which will be single-circuit 500 kV transmission lines from Longwood Transformer Station to Lakeshore Transformer Station.⁴⁹ The first line is anticipated to be completed by 2030, while the second line will be determined upon further planning by the IESO. Engagement with Indigenous peoples and members of the public, stakeholders, and other interested parties is stated to be underway in an effort for Hydro One to consider the needs and interests of those potentially impacted by the development of the planned projects.⁵⁰

D. MINES AND MINERALS

The Canadian Critical Minerals Strategy (Strategy) was released in December 2022 to boost the production and processing of Canada’s critical minerals (including lithium, graphite, copper, nickel, cobalt, and rare earth metals) given their potential to promote significant economic growth in the country.⁵¹ Critical minerals are key to the development of EV batteries and contribute to the global transition towards sustainability and clean

⁴³ Canada Energy Regulator, *Letter Decision*, File OF-Fac-IPL-H141-2019-01 01 (Calgary: CER, 20 May 2021), online: [perma.cc/F79V-VF5H].

⁴⁴ *Ibid.*

⁴⁵ *Ibid.* at 11, 13.

⁴⁶ Ontario Energy Board, *Decision and Order*, EB-2022-0140 (Toronto: OEB, 24 November 2022) at 2, online: [perma.cc/S38G-YU46]. This decision and order refers to Hydro One Network Inc.’s application for leave to construct a double-circuit transmission line between Chatham Switching Station and Lakeshore Transformer Station and associated station facilities in the municipalities of Chatham-Kent and Lakeshore and the County of Essex.

⁴⁷ *Ibid.* at 14.

⁴⁸ *Ibid.* at 1.

⁴⁹ “Longwood to Lakeshore Project,” online: *Hydro One* [perma.cc/9C3A-CXC9].

⁵⁰ *Ibid.*

⁵¹ Natural Resources Canada, *The Canadian Critical Minerals Strategy*, Catalogue No M34-82/2022E-PDF (Ottawa: Natural Resources Canada, 2022), online: [perma.cc/GV6W-Q38D].

technology.⁵² Following the release of the Strategy, the Government of Canada is seeking long-term, multi-stakeholder partnerships from industry, provincial, territorial, Indigenous, and international partners to promote critical mineral development.

On 30 November 2022, the Minister of Environment and Climate Change and the Minister responsible for the Impact Assessment Agency of Canada approved the Marathon Palladium Project (Marathon Project).⁵³ The Marathon Project is a palladium mine located 10 kilometres from Marathon, Ontario for the production of critical minerals, specifically platinum group metals used in the manufacturing of automotive catalytic converters, and copper for the development of electric vehicles.⁵⁴ The Marathon Project is consistent with the Strategy. The Joint Review Panel (Panel) completed an environmental assessment for the Marathon Project dated 2 August 2022, which included consideration of cumulative effects for each valued ecosystem component that may be impacted by the Marathon Project.⁵⁵ For instance, the Panel concluded that the Marathon Project is not likely to result in a cumulative effect on ground and surface water quantity or quality, but is likely to cause an adverse cumulative effect on critical habitat for caribou.⁵⁶ However, the Government of Canada ultimately approved the Marathon Project with 269 legally binding conditions to protect the environment throughout the life of the project.⁵⁷

E. VIRTUAL POWER PURCHASE AGREEMENT

A virtual power purchase agreement (VPPA) is a financial agreement between a seller and a purchaser where there is no physical exchange of energy. Rather, the seller sells the electricity to the local wholesale electricity market at market price and the buyer continues to get their electricity from the utility regulator at the utility rate. As a result, it creates more certainty regarding electricity costs and protects from market price volatility. Over the last decade, VPPAs have increased in popularity for corporations in order to meet their performance goals. For example, Campbell Soup Co. entered into a 12-year VPPA with Enel North America to purchase electricity from Enel North America's wind farm in November 2022.⁵⁸ In 2022, the market for corporate renewable energy procurement in Canada bounded over two gigawatts.⁵⁹

⁵² *Ibid* at 1.

⁵³ Ontario, Ministry of the Environment, Conservation and Parks, *Report of the Joint Review Panel: Marathon Palladium Project*, Catalogue No En106-245/2022E-PDF (Toronto: the Joint Review Panel Established by the Federal Minister of Environment and Climate Change and the Ontario Minister of the Environment, Conservation and Parks, 2 August 2022), online: [perma.cc/G7UN-WFLG].

⁵⁴ *Ibid* at xi.

⁵⁵ *Ibid*.

⁵⁶ *Ibid* at 124, 204.

⁵⁷ Impact Assessment Agency of Canada, *Government of Canada Approves the Marathon Palladium Project* (News Release) (Ottawa: Impact Assessment Agency of Canada, 30 November 2022), online: [perma.cc/G8VJ-9XAL].

⁵⁸ Campbell Soup Company, Press Release, "Campbell Enters Into Renewable Energy Agreement with Enel North America to Advance Greenhouse Gas Reduction Targets" (21 November 2022), online: [perma.cc/5HNL-8WQK].

⁵⁹ Nagwan Al-Guneid, News Release, "Renewable Energy Target Raised to Match Corporate Purchasing Enthusiasm" (23 November 2022), online: [perma.cc/7EKB-TE28].

F. POWER PROJECT AND THE INTERESTS OF INDIGENOUS PEOPLES

1. THE LAKE ERIE CONNECTOR PROJECT – APPLICATION FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

In 2015, ITC Lake Erie Connector LLC (ITC) applied for a certificate of public convenience and necessity with the National Energy Board, the predecessor to the CER, to construct and operate an international power line called the Lake Erie Connector Project (Lake Erie Project).⁶⁰ The Lake Erie Project was a proposed 117 kilometre high voltage power line to transfer electricity between Ontario, Canada, and Pennsylvania, in the United States, crossing Lake Erie.⁶¹ The project was found to be in the public interest, and a certificate was issued with various conditions with respect to the project in 2017.⁶²

2. THE LAKE ERIE CONNECTOR PROJECT – VARIANCE APPLICATION

On 29 September 2021, ITC filed the 2021 Variance Application requesting that the CER extend the time for the commencement of construction of the project to 26 June 2024, replace ITC to LEC GP Inc. on behalf of Lake Erie LP, and amend the certificate accordingly.⁶³ The Haudenosaunee Development Institute (HDI), on behalf of the Haudenosaunee Confederacy Chiefs Council and the Haudenosaunee, made submissions regarding the 2021 Variance Application indicating the Lake Erie Project will seriously impair the exercise of their rights.⁶⁴ Additionally, the HDI submitted that the Crown and ITC failed to obtain the consent of the Haudenosaunee, as required by the United Nations Declaration on the Rights of Indigenous Peoples, and had failed to meaningfully engage with the Haudenosaunee.⁶⁵ ITC, on the other hand, argued that the CER's assessment is limited to considering the impact of the specific variances, namely, the request to extend the commencement of the Lake Erie Project and to transfer the certificate.⁶⁶ The CER determined that, considering HDI's submissions, the broader project impacts were not properly within the CER's mandate in the context of the 2021 Variance Application.⁶⁷ The requested variances were found to be in the public interest, therefore the 2021 Variance Application was approved and the Amending Order was issued.⁶⁸

⁶⁰ ITC Lake Erie Connector: Project Description (Part 1) filed by ITC Lake Erie Connector LLC with the National Energy Board (30 January 2015) Doc ID A4G9Y1, online: [perma.cc/27MP-3WWT] [ITC Part 1]; ITC Lake Erie Connector: Project Description (Part 2) filed by ITC Lake Erie Connector LLC with the National Energy Board (30 January 2015) Doc ID A4G9Y2, online: [perma.cc/5JYP-UHRE]; ITC Lake Erie Connector: Project Description (Part 3) filed by ITC Lake Erie Connector LLC with the National Energy Board (30 January 2015) Doc ID A4G9Y3, online: [perma.cc/8DRJ-R5BQ].

⁶¹ ITC Part 1, *ibid* at 1.

⁶² Canada Energy Regulator, *Letter Decision*, File OF-Fac-IPL-1175-2015-01-03 (Calgary: CER, 25 August 2022) at 3, online: [perma.cc/X6Y2-KVT2].

⁶³ *Ibid* at 1.

⁶⁴ *Ibid* at 9.

⁶⁵ *Ibid*.

⁶⁶ *Ibid* at 10.

⁶⁷ *Ibid* at 11.

⁶⁸ *Ibid* at 13.

3. THE MANITOBA-MINNESOTA TRANSMISSION PROJECT – APPEAL TO THE FEDERAL COURT OF APPEAL

The Federal Court of Appeal upheld a CER decision concerning the implementation and tracking of commitments made to the Manitoba Métis Federation (MMF) with respect to the Manitoba-Minnesota Transmission Project (MMT Project), an international power line between Winnipeg and the Manitoba-Minnesota border.⁶⁹ The CER decision had found Manitoba Hydro-Electric Board (Manitoba Hydro) to be compliant with Condition 3 of its Certificate of Public Convenience and Necessity issued for the MMT Project.⁷⁰ MMF asserted that Manitoba Hydro was not in compliance with its commitments made to Indigenous groups captured by Condition 3, as modified by the Governor in Council, and failed to track those commitments as required by Condition 15.⁷¹ The CER determined that the major-agreed upon points that were reduced to writing on 29 June 2017 (the MAP), which provided for the payment by Manitoba Hydro to the MMF of \$1.5 million annually for 20 years and a one-time lump sum payment of \$37.5 million to be held in a legacy fund for the benefit of MMF, was not a commitment made to MMF.⁷² The CER concluded that only formal commitments need to be tracked for compliance. The Federal Court of Appeal found that although the MAP may have been put on the record by MMF in the proceedings, Manitoba Hydro must formally agree to the commitments for the CER to be in a position to enforce them as regulatory conditions.⁷³ Since Manitoba Hydro objected to the MAP forming part of the record of the proceedings leading to the CER's decision, it is not a commitment captured by Condition 3 and, therefore, not required to be tracked under Condition 15.⁷⁴

We note that the Governor in Council released an Order in Council directing the National Energy Board to issue the Certificate of Public Convenience and Necessity for the MMT Project.⁷⁵ The Peguis First Nation, the Roseau River Anishinabe First Nation, the Long Plain First Nation, and the Animakee Wa Zhing #37 First Nation filed a judicial review of the Order in Council for the MMP Project.⁷⁶ The applicants claimed that Canada failed to properly assess the scope of its duty to consult and accommodate them.⁷⁷ The Federal Court found that Canada did not adequately discharge its duty to consult the Peguis First Nation because, although the framework established for consultation was sufficiently robust to satisfy the duty to consult, in execution it did not satisfy that duty because there was “no effort by Canada to ascertain Peguis’ outstanding concerns.”⁷⁸ In contrast, the Federal Court found that Canada met its duty to consult and accommodate the Roseau River Anishinabe First Nation, the Long Plain First Nation, and the Animakee Wa Zhing #37 First Nation, concluding that there was substantive dialogue between Canada and the three First Nations.⁷⁹

⁶⁹ *Manitoba Métis Federation Inc v Canada (Energy Regulator)*, 2023 FCA 24.

⁷⁰ *Ibid.*

⁷¹ *Ibid* at paras 20–21.

⁷² *Ibid* at para 47.

⁷³ *Ibid* at para 168.

⁷⁴ *Ibid* at paras 130, 168, 181, 185.

⁷⁵ PC 2019-0784, online: [perma.cc/8696-YWKL].

⁷⁶ *Peguis First Nation v Canada (Attorney General)*, 2021 FC 990.

⁷⁷ *Ibid* at paras 133, 152, 191, 207.

⁷⁸ *Ibid* at para 144.

⁷⁹ *Ibid.* The Roseau River Anishinabe First Nation, the Long Plain First Nation, and the Animakee Wa Zhing #37 First Nation appealed the Federal Court's decision to the Federal Court of Appeal: *Roseau River First Nation v Canada (Attorney General)*, 2023 FCA 163.

**G. AMENDMENT TO ALBERTA’S ELECTRICITY
LEGISLATION INTRODUCED BY BILL 22:
*ELECTRICITY STATUTES (MODERNIZING ALBERTA’S
ELECTRICITY GRID) AMENDMENT ACT, 2022***

On 31 May 2022, the *Electricity Statutes (Modernizing Alberta’s Electricity Grid) Amendment Act, 2022* received Royal Assent and was passed by the Legislative Assembly of Alberta.⁸⁰ The legislative amendments introduced by the *Electricity Statutes Amendment Act* will come into force on proclamation, at the same time as related regulations are brought into force. The *Electricity Statutes Amendment Act* introduces amendments to the *Hydro and Electric Energy Act*,⁸¹ the *Electric Utilities Act*,⁸² and the *Alberta Utilities Commission Act*.⁸³ Some of the most anticipated amendments relate to the implementation of definitions of “energy storage” and “energy storage facility” into the existing regulatory framework, and the introduction of a new exemption under the *Electric Utilities Act*, allowing owners of generation units to both self-supply and sell excess power to the electricity grid.⁸⁴

**H. FOOTHILLS SOLAR PROJECT
APPLICATION DENIED BY AUC**

On 20 April 2023, the Alberta Utilities Commission (AUC) released its decision denying the application from Foothills Solar GP Inc. to construct and operate a 150 megawatt solar power plant and substation (the Foothills Solar Project) on privately owned land southwest of Blackie, Alberta.⁸⁵ The AUC’s reason for denying the application was the potential for unacceptable impacts of the Foothills Solar Project on the Frank Lake Important Bird Area (Frank Lake IBA).⁸⁶ The Frank Lake IBA is an internationally recognized, but not legally protected, area of importance to migratory and breeding birds, including 256 species, 60 of which are species at risk.⁸⁷

Eighty percent of the footprint of the Foothills Solar Project was proposed to be built within the Frank Lake IBA setback, which raised concerns from both Alberta Energy and Parks and interveners that the Foothills Solar Project could result in high bird mortality and other negative environmental impacts.⁸⁸ The AUC was not convinced that these impacts could be effectively mitigated.⁸⁹

This decision represents the tension regulators face when determining whether a project is in the public interest, given the potentially competing goals of decarbonization of the power grid through increased renewable generation and protection of wildlife. It also provides some guidance to proponents on consideration of wildlife sites that are

⁸⁰ SA 2022, c 8 [*Electricity Statutes Amendment Act*].

⁸¹ RSA 2000, c H-16.

⁸² SA 2003, c E-5.1.

⁸³ SA 2007, c A-37.2.

⁸⁴ *Electricity Statutes Amendment Act*, *supra* note 80.

⁸⁵ *Foothills Solar Project Foothills Solar GP Inc* (20 April 2023), 27486-D01-2023, online: *Alberta Utilities Commission* [perma.cc/7BK2-3PMV].

⁸⁶ *Ibid* at paras 78, 85.

⁸⁷ *Ibid* at para 45.

⁸⁸ *Ibid* at paras 50, 60–72.

⁸⁹ *Ibid* at para 73.

internationally recognized but lack legal protection in Canada. In this case, the AUC was not satisfied that the overall benefits of the Foothills Solar Project outweighed its negative impacts and, therefore, its approval was not found to be in the public interest.⁹⁰

IV. HYDROGEN

In this section we provide updates on progress towards implementing the federal and provincial hydrogen strategies.

A. FEDERAL STRATEGY

In December 2020, the Government of Canada published its “Hydrogen Strategy for Canada.”⁹¹ The *Federal Hydrogen Strategy* identifies the need for new hydrogen supply and distribution infrastructure and to promote uptake in various end uses. The *Federal Hydrogen Strategy* is comprised of eight pillars and 32 recommendations for the near-, medium-, and long-term development of the hydrogen industry in Canada.⁹²

We are now over halfway through the first phase of the *Federal Hydrogen Strategy*, which was slated for 2020 to 2025.⁹³ One notable recent development was the announcement of almost \$10 million of federal investment to advance Alberta’s hydrogen economy.⁹⁴ The federal investment is meant to improve access to hydrogen fuels, support product testing, attract investment to Alberta’s hydrogen industry, and increase the availability of training opportunities to commercialize new technologies, while supporting jobs for Albertan workers.⁹⁵

B. PROVINCIAL STRATEGIES

1. BRITISH COLUMBIA *ENERGY STATUTES AMENDMENT ACT, 2022*

British Columbia revealed the British Columbia Hydrogen Strategy in 2021.⁹⁶ In November 2022, the British Columbia legislature passed the *Energy Statutes Amendment Act, 2022*.⁹⁷ The *ESAA 2022* replaces the *Energy Resource Activities Act*,⁹⁸ and makes changes to the *Petroleum and Natural Gas Act*.⁹⁹ The *ESAA 2022* renames British

⁹⁰ *Ibid* at para 85.

⁹¹ Natural Resources Canada, *Hydrogen Strategy for Canada: Seizing the Opportunities for Hydrogen - A Call to Action*, Cat No M134-65/2020E-PDF (Ottawa: Natural Resources Canada, December 2020), online: [perma.cc/R5EJ-ZZL4] [*Federal Hydrogen Strategy*].

⁹² Gavin Fitch KC, Michael Barbero & Kimberly Wasylenchuk, “Hydrogen Roadmap: Policy, Regulation, and Prospect for Future Developments in Alberta” (2022) 60:2 *Alta L Rev* 435 at 445.

⁹³ *Federal Hydrogen Strategy*, *supra* note 91 at 101.

⁹⁴ Prairies Economic Development Canada, *Minister Vandal Announces Federal Investment to Advance Alberta’s Hydrogen Economy* (News Release) (Edmonton: Prairies Economic Development Canada, 17 January 2023), online: [perma.cc/9YYY-2QQN].

⁹⁵ *Ibid*.

⁹⁶ British Columbia, *B.C. Hydrogen Strategy: A Sustainable Pathway for B.C.’s Energy Transition* (Victoria: Government of British Columbia, 6 July 2021), online: [perma.cc/4XZH-MGQ9] [*BC Hydrogen Strategy*]. See also Fitch, Barbero & Wasylenchuk, *supra* note 92 (thoroughly discusses *BC Hydrogen Strategy*, *ibid*).

⁹⁷ Bill 37, *Energy Statutes Amendment Act, 2022*, 3rd Sess, 42nd Parl, 2022 (as passed by the Legislative Assembly of British Columbia 24 November 2022) [*ESAA 2022*].

⁹⁸ SBC 2008, c 36.

⁹⁹ RSBC 1996, c 361.

Columbia's Oil and Gas Commission to the British Columbia Energy Regulator (BCER), and gives the BCER jurisdiction over hydrogen, as well as oil, gas, ammonia, and methanol.¹⁰⁰ Many of the sections of the *ESAA* 2022 that affect hydrogen will not come into force until subsequent regulations are enacted.

2. ALBERTA HYDROGEN ROADMAP

The Alberta Ministry of Energy published the *Alberta Hydrogen Roadmap* in November 2021.¹⁰¹ In March 2022, the Government of Alberta issued an Order in Council directing the AUC to inquire and report to the Minister of Energy on the viability and impacts of hydrogen blending into natural gas distribution systems in Alberta, resulting in a June 2022 report.¹⁰²

The AUC found that “[t]he current allocation of responsibilities between relevant Alberta agencies is capable of accommodating hydrogen development and its integration in the low-pressure distribution system.”¹⁰³ In the report, the AUC recommended updating the definition of “gas” in the *Gas Utilities Act*¹⁰⁴ and *Gas Distribution Act*¹⁰⁵ to include “up to 20 per cent hydrogen by volume” as the most efficient way to enable hydrogen blending in Alberta.¹⁰⁶ The AUC’s view was that, pending further study, competitive retailers should be responsible for procuring hydrogen unless a competitive market does not exist, in which case distributors should perform procurement.¹⁰⁷ Other matters considered in the report included safety issues, harmonizing regulations with federal and provincial governments, delivery to rural consumers, and issues around blending. The AUC noted that it is too early to consider allocation of capital and commodity costs, and suggested the Alberta Government may need to establish a clear policy to balance the social and environmental factors of blending hydrogen with the affordability of utility services for customers.¹⁰⁸ Overall, the report represents a thorough analysis of potential issues with integrating hydrogen into Alberta’s natural gas system, and is a strong step in line with the *Alberta Hydrogen Roadmap*.

3. ONTARIO’S LOW CARBON HYDROGEN STRATEGY

Ontario’s hydrogen strategy was issued in April 2022.¹⁰⁹ At the same time, the Ontario Ministry of Energy directed the IESO to investigate and propose program options to integrate low-carbon hydrogen technologies into Ontario’s electricity grid. The IESO’s final report to the Ministry highlighted hydrogen storage and generation, and potentially blending hydrogen in natural gas-fired turbines.¹¹⁰ In January 2023, the Ministry of Energy further directed the

¹⁰⁰ *ESAA* 2022, *supra* note 97, ss 4–5.

¹⁰¹ Alberta, Ministry of Energy, *Alberta Hydrogen Roadmap* (Alberta: Ministry of Energy, 5 November 2021), online: [perma.cc/5F9T-U5P9].

¹⁰² Alberta Utilities Commission, *Hydrogen Inquiry Report: Proceeding 27256* (Calgary: AUC, 30 June 2022), online: [perma.cc/9UFX-29DK] [*Hydrogen Inquiry Report*].

¹⁰³ *Ibid* at 1.

¹⁰⁴ RSA 2000, c G-5.

¹⁰⁵ RSA 2000, c G-3.

¹⁰⁶ *Hydrogen Inquiry Report*, *supra* note 102.

¹⁰⁷ *Ibid*.

¹⁰⁸ *Ibid* at 3.

¹⁰⁹ Ontario, *Ontario’s Low-Carbon Hydrogen Strategy: A Path Forward* (Toronto: Government of Ontario, 7 April 2022). See also Fitch, Barbero & Wasylenchuk, *supra* note 92.

¹¹⁰ Ontario, Independent Electric System Operator, *Hydrogen Innovation Fund: Request for Proposals*, (Toronto: IESO, 2023), online: [perma.cc/XY2-K7HS].

IESO to develop and implement a Hydrogen Innovation Fund to integrate hydrogen technologies into Ontario's electricity grid. Engagement on the fund is ongoing at the time of writing.¹¹¹

V. CUMULATIVE EFFECTS

The law on cumulative effects continues to evolve following the 2021 British Columbia Supreme Court decision in *Yahey v. British Columbia*.¹¹² While there has yet to be a pronouncement at the appellate court level of the *Yahey* analysis, precedents on how to practically address cumulative effects with adverse impacts on the exercise of Aboriginal and Treaty rights continue to develop. These precedents, as well as other cumulative effect claims brought by Indigenous peoples following *Yahey*, indicate a trend towards regulatory co-operation in acknowledgment of Indigenous self-governance.

These developments contribute to a better understanding — and, accordingly, greater certainty for industry — of regulators' expectations in relation to a project's cumulative effects. However, the developing case law and regulatory decisions dealing with cumulative effects fail to provide a conceptual analysis of cumulative effects separate and distinct from impacts of project development on Indigenous interests. With growing governmental efforts in the realm of conservation,¹¹³ it remains unclear how regulators will assess statutory cumulative effects requirements in the context of broader environmental goals.¹¹⁴

A. YAHEY AND BRITISH COLUMBIA – BLUEBERRY RIVER FIRST NATIONS IMPLEMENTATION AGREEMENT

On 18 January 2023, in response to the British Columbia Supreme Court decision in *Yahey*, the Government of British Columbia and the Blueberry River First Nations (BRFN) entered into the *Blueberry River First Nations Implementation Agreement*.¹¹⁵

In *Yahey*, the British Columbia Supreme Court found that the cumulative effects of industrial development permitted by British Columbia within BRFN's traditional territory (Claim Area) unjustifiably infringed the ability of BRFN to meaningfully exercise rights guaranteed to BRFN under Treaty 8.¹¹⁶ The British Columbia Supreme Court ordered that: (1) British Columbia was not entitled to continue authorizing activities in breach of the promises in Treaty 8, including British Columbia's honourable and fiduciary obligations

¹¹¹ *Ibid.*

¹¹² 2021 BCSC 1287 [*Yahey*].

¹¹³ In recent years, the Government of Canada has issued plans and messaging indicating that cumulative effects, conservation, and climate change are priorities: see e.g. Environment and Climate Change Canada, *2022-2023 Departmental Plan*, Catalogue No En1-65E-PDF (Gatineau: ECCC, 2022), online: [perma.cc/SC3A-MUP8]; Prime Minister of Canada, News Release, "Delivering Clean Air and a Strong Economy for Canadians" (29 March 2022), online: [perma.cc/98AQ-EREJ]; Canada, Environment and Natural Resources, *Government of Canada Interim Message on Cumulative Effects* (News Release) (Ottawa: Environment and Natural Resources, 6 September 2023), online: [perma.cc/QK6X-5GXS]; Fisheries and Oceans Canada, *Reaching Canada's Marine Conservation Targets* (Ottawa: Fisheries and Oceans Canada, 6 June 2023), online: [perma.cc/74LX-FE93].

¹¹⁴ See e.g. *Impact Assessment Act*, SC 2019, c 28, s 1, ss 22(1)(a), 22(1)(c) [IAA].

¹¹⁵ British Columbia, *Blueberry River First Nations Implementation Agreement*, 18 January 2023, online: [perma.cc/2ZEW-ZLQZ] [*Implementation Agreement*].

¹¹⁶ *Yahey*, *supra* note 112 at paras 1116, 1132, 1881.

associated with Treaty 8, or activities that unjustifiably infringed BRFN's exercise of its treaty rights; and (2) British Columbia and BRFN were required to "act with diligence to consult and negotiate for the purpose of establishing timely enforceable mechanisms to assess and manage the cumulative impact of industrial development on Blueberry's treaty rights."¹¹⁷

Following the decision, the parties entered into negotiations to develop processes for addressing cumulative effects within the Claim Area and entered into an interim agreement on 7 October 2021 (Interim Agreement).¹¹⁸ Considering the British Columbia Supreme Court's orders in *Yahey*, the decision had significant impacts on project activities proposed to occur in the Claim Area, most significantly in respect of regulatory approvals. As part of the measures in the Interim Agreement, British Columbia and BRFN agreed to allow 195 authorizations for projects granted prior to *Yahey* to proceed immediately and prioritized the review of permit applications based on emergency, environmental protection, and public safety reasons.¹¹⁹

British Columbia and BRFN entered into the *Implementation Agreement* to co-operate in the management of land, water, wildlife, and resource development in the Claim Area, so that BRFN members can meaningfully exercise their Treaty 8 rights.¹²⁰ The *Implementation Agreement* contemplates a Cumulative Effects Management Regime aimed at the following goals: (1) enhancing restoration of previously disturbed areas; (2) creating new areas protected from industrial disturbance; and (3) supporting and constraining certain development activities while the parties develop permanent measures.¹²¹

The *Implementation Agreement* includes the following measures:

- Designation of high-value areas (HV1 areas) within the Claim Area where certain industrial activities will be prohibited or limited.¹²² The parties will agree on the form of legislative or regulatory protection for HV1 areas.¹²³
- Establishment of new-disturbance caps ranging from 200 to 550 hectares per calendar year depending on the area in question, a disturbance fee payable by applicants, and disturbance reporting obligations by regulators to BRFN and British Columbia.¹²⁴

¹¹⁷ *Ibid* at para 1888.

¹¹⁸ British Columbia, News Release, "B.C., Blueberry River First Nations Reach Agreement on Existing Permits, Restoration Funding" (7 October 2021), online: [perma.cc/4EGC-5SHH].

¹¹⁹ British Columbia Energy Regulator, News Release, "The Province and Blueberry River First Nations Are Working Together on a Path Forward in the Claim Area, Following the June 2021 B.C. Supreme Court Decision" (7 October 2021), online: [perma.cc/HY2S-868L].

¹²⁰ British Columbia Ministry of Water, Land and Resource Stewardship, News Release, "Province, Blueberry River First Nations Reach Agreement" (18 January 2023), online: [perma.cc/6QB8-9LC9].

¹²¹ *Implementation Agreement*, *supra* note 115, art 2.2.

¹²² *Ibid*, arts 5–7.

¹²³ *Ibid*, art 5.3.

¹²⁴ *Ibid*, arts 14.1–14.2, 14.7.

- Development of a potential carbon offset project within the Claim Area, whereby BRFN will accrue the economic benefits as follows: (1) 100 percent ownership for HV1 areas; and (2) substantive ownership for other areas within the Claim Area.¹²⁵
- Joint decision-making for future industrial development and, in some defined circumstances, requirements of consent by BRFN.¹²⁶
- Expedited consideration of existing priority natural resource applications,¹²⁷ and processes for new natural resource applications to be reviewed “in a timely manner.”¹²⁸
- Creation and funding of a \$200 million restoration fund by British Columbia and third parties by June 2025 in support of restoration efforts within the Claim Area.¹²⁹

B. TREATY 8 FIRST NATIONS’ CONSENSUS DOCUMENT

As another implication of *Yahey*, on 20 January 2023, British Columbia and four Treaty 8 First Nations — namely, Fort Nelson, Saulteau, Halfway River, and Doig River First Nations (Treaty 8 First Nations) — co-developed a set of initiatives for land and resource planning (Consensus Document).¹³⁰

The goal of the Consensus Document is to address the cumulative impacts of industrial development on the meaningful exercise of Treaty 8 rights in the territory, restore the land, and provide stability and predictability for industry in the region. The proposed initiatives in the Consensus Document include shared decision-making, a cumulative effects management system, as well as a shared restoration fund and a new revenue-sharing approach.

C. CUMULATIVE EFFECTS CLAIMS FOLLOWING *YAHEY*

1. DUNCAN’S FIRST NATION CLAIM

On 18 July 2022, Duncan’s First Nation (DFN) filed a claim against the Government of Alberta similar to *Yahey* on the basis that Alberta breached its obligations under Treaty 8 by authorizing development within DFN’s traditional territory without regard to cumulative effects and consequent adverse cumulative impacts on DFN’s exercise of their treaty rights.¹³¹ DFN claims that Alberta has deficient mechanisms for assessing cumulative effects,¹³² and as a result, has issued (and continues to issue) authorizations for projects

¹²⁵ *Ibid*, art 5.4.

¹²⁶ *Ibid*, arts 6.4–6.5, 6.9, 7.3, 15.3.

¹²⁷ *Ibid*, art 9.5.

¹²⁸ *Ibid*, art 9.2.

¹²⁹ *Ibid*, arts 10.1, 10.3–10.4.

¹³⁰ British Columbia Office of the Premier, News Release, “B.C., Treaty 8 First Nations Build Path Forward Together” (20 January 2023), online: [perma.cc/EJ9G-F88L].

¹³¹ *Duncan’s First Nation v Alberta* (18 July 2022), File Number 2203 10939 (Statement of Claim) [DFN Statement of Claim].

¹³² *Ibid* at 53.

related to agriculture, energy, forestry, mining, transportation, and other developments within DFN's traditional territory.

On 30 January 2023, Alberta filed a Statement of Defence and, on 9 February 2023, the plaintiffs filed a reply to the Crown's Statement of Defence.¹³³ The proceedings are currently ongoing.

2. MISSANABIE CREE FIRST NATION, BRUNSWICK HOUSE FIRST NATION, AND CHAPLEAU CREE FIRST NATION CLAIM

On 30 September 2022, Missanabie Cree First Nation, Brunswick House First Nation, and Chapleau Cree First Nation (Treaty 9 First Nations) launched a claim against the Government of Ontario for Ontario's management of boreal forests within the Treaty 9 First Nations' traditional territories.¹³⁴ The Treaty 9 First Nations claim that Ontario has breached its obligations under Treaty 9 by authorizing significant development, the cumulative effects of which have adversely impacted the health of boreal forests within their traditional territories and, as a result, the Treaty 9 First Nations' livelihoods and way of life.¹³⁵ In addition to declarations similar to those ordered in *Yahey*, the Treaty 9 First Nations are seeking compensation for past damages.¹³⁶

On 17 October 2022, Ontario filed a notice of intent to defend the claim.¹³⁷ Under Rule 18.02 of Ontario's *Rules of Civil Procedure*, a notice of intent to defend provides a defendant an additional 10 days to serve and file a Statement of Defence.¹³⁸ However, counsel may agree to defer the deadline to file the Statement of Defence indefinitely. According to information obtained from the Ontario courts, various case conferences have been scheduled on this matter.¹³⁹

3. NOVA GAS TRANSMISSION LTD. WEST PATH DELIVERY 2023 PROJECT APPROVAL

On 24 May 2022, the Commission of the CER (Commission) issued its report (CER Report) on an application by NOVA Gas Transmission Ltd. (NGTL) to construct and operate

¹³³ *Duncan's First Nation v Alberta* (30 January 2023), File Number 2203 10939 (Statement of Defence) [Her Majesty the Queen Statement of Claim]; *Duncan's First Nation v Alberta* (9 February 2023), File Number 2203 10939 (Reply to Statement of Defence) [DFN Reply to Statement of Defence].

¹³⁴ Brunswick House First Nation, Chapleau Cree First Nation & Missanabie Cree First Nation, Media Release, 00077899-1, "Treaty 9 First Nations Bring Legal Action to Stop Degradation of the Boreal Forest in Their Traditional Territories," (4 October 2022), online: [perma.cc/FMT7-78UA] [Treaty 9 Press Release]; Lynette Fortune & Stephanie Matteis, "Canada, Home to a Massive Boreal Forest, Lobbied to Limit U.S., EU Anti-Deforestation Bills," *CBC News* (10 March 2023), online: [perma.cc/FNX7-3FRP]; "3 Northern First Nations Take Ontario to Court Over Environmental Protection, Treaty Rights," *CBC News* (6 October 2022), online: [perma.cc/4W3Q-LJKC].

¹³⁵ Treaty 9 Press Release, *ibid*; Isaac Phan Nay, "Three First Nations Have Filed for Legal Action Against Ontario Over Boreal Forests," *Toronto Star* (4 October 2022), online: [perma.cc/RM6B-9S3Q].

¹³⁶ Phan Nay, *ibid*.

¹³⁷ *Corston v Ontario* (17 October 2022), Case Number 22006880370000 (Notice of Intent to Defend) [Ontario Notice of Defend].

¹³⁸ RRO 1990, Reg 194.

¹³⁹ The authors contacted counsel to request an update on this matter but, at the time of publication, had not received a response.

the West Path Delivery 2023 Project (NGTL Project).¹⁴⁰ The NGTL Project is an extension of approximately 39 kilometres of new natural gas pipeline in southwestern Alberta to the existing 25,000 kilometre NGTL system.¹⁴¹

As part of the *CER Report*, the Commission considered the NGTL Project's cumulative effects, understood as the impacts of residual effects associated with the NGTL Project in combination with the residual effects from other projects and activities that have been or are reasonably foreseeable to be carried out within the appropriate temporal and spatial boundaries and ecological context.¹⁴² The Commission explained that its approach for cumulative effects assessments is to consider not only total cumulative effects but also project's relative contribution to total cumulative effects: "If the total cumulative effects are considered to be high (e.g., exceed a relevant threshold for a particular [valued component]), then effects on that component will generally be found to be significant unless the [NGTL Project] contribution to total cumulative effects is negligible."¹⁴³

As part of its cumulative effects analysis, the Commission considered cumulative effects on traditional land and resource use. The Commission found the NGTL Project's "contribution to total cumulative effects on Traditional Land and Resources Use in the region to be negligible."¹⁴⁴ In reaching this conclusion, the Commission characterized the effects as ranging from short-term to long-term in duration, local to regional in geographical extent, low to moderate in magnitude, and of low to medium significance depending on the NGTL Project area.¹⁴⁵ The Commission highlighted that NGTL chose to locate the NGTL Project almost entirely on private land and paralleling existing rights of way.

In response to concerns from Indigenous peoples, the Commission imposed various conditions on the NGTL Project, including requiring updates to traditional land and resource use investigations and other plans and engagement with affected Indigenous peoples.¹⁴⁶

The Commission stated:

The Commission heard the concerns raised by Indigenous peoples about the impact of cumulative effects on Traditional Land and Resource Use in the areas affected by the Project. The Commission is aware that existing cumulative effects in the area of the Project (e.g., agricultural conversion, private land conversion, forest harvesting, oil and gas production, and linear development) create challenges relative to the ability of Indigenous peoples to continue to use the lands and resources for traditional purposes. Cognizant of the existing total cumulative effects in which the Project is proposed, the Commission has assessed NGTL's mitigation measures such as restricting all construction activities to the Project footprint, implementing the Cultural Resource Discovery Contingency plan (if any unanticipated Traditional Land and Resource sites are encountered), and ongoing engagement with Indigenous peoples. These mitigation measures are intended to address effects on both the biophysical resources that support Traditional Land and Resource Use activities

¹⁴⁰ Canada Energy Regulator, *NOVA Gas Transmission Ltd. - GH-002-2020*, Catalogue No NE4-5/2022-1E (Calgary: CER, 24 May 2022), online: [perma.cc/C8SV-S3T3] [*CER Report*].

¹⁴¹ *Ibid* at 1, 7.

¹⁴² *Ibid* at 24.

¹⁴³ *Ibid*.

¹⁴⁴ *Ibid* at 75.

¹⁴⁵ *Ibid*.

¹⁴⁶ *Ibid* at 76.

and the effects on Traditional Land and Resource Use activities themselves. The Commission finds NGTL's mitigation measures to be appropriate given the scope, scale and nature of the Project effects.¹⁴⁷

VI. ABORIGINAL LAW

The overall themes in Aboriginal law this year were: (1) continued progress in implementing the *United Nations Declaration on the Rights of Indigenous Peoples* in British Columbia;¹⁴⁸ (2) an increase in large-scale Indigenous-owned energy projects; and (3) litigation reconfirming both that the duty to consult does not apply to the legislative process,¹⁴⁹ and that injunctive relief may not be available for protecting asserted yet unproven Aboriginal title claims where the injunction would prevent completion of the consultation process.¹⁵⁰

A. UNDRIP LEGISLATION (BRITISH COLUMBIA AND FEDERAL)

In November 2019, British Columbia enacted the *Declaration on the Rights of Indigenous Peoples Act*.¹⁵¹ This was the first UNDRIP implementation legislation in Canada. DRIPA operates by setting out a process for the British Columbia government to bring provincial laws into alignment with UNDRIP. In 2022, we saw DRIPA begin to be put into action through the Tahltan Central Government – B.C. Agreement, discussed more below.¹⁵²

In June 2021, the Government of Canada enacted the *United Nations Declaration on the Rights of Indigenous Peoples Act*.¹⁵³ Similar to DRIPA, the UNDRIP Act does not make UNDRIP binding law in Canada, but creates a process for assessing whether Canadian laws are consistent with it. The Government of Canada has stated that the current phase of this process focuses on working with Indigenous peoples to better understand their priorities, and that an action plan will be completed by June 2023.¹⁵⁴ The 2022 report on the progress of implementing the UNDRIP Act appears to be forward-looking, without tangible results to report yet.¹⁵⁵

¹⁴⁷ *Ibid* at 77.

¹⁴⁸ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 53, UN Doc A/61/295 (2007) 1, online: [perma.cc/VD5A-8VET] [UNDRIP].

¹⁴⁹ *Association of Iroquois and Allied Indians v Ontario (Minister of Environment, Conservation and Parks)*, 2022 ONSC 5161 [Association of Iroquois and Allied Indians].

¹⁵⁰ *British Columbia (Attorney General) v Reece*, 2023 BCCA 257 [Reece BCCA], overturning *Reece v Canada (Attorney General)*, 2022 BCSC 865 [Reece BCSC].

¹⁵¹ SBC 2019, c 44 [DRIPA].

¹⁵² See e.g. British Columbia & Tahltan Central Government, *Declaration Act Consent Decision-Making Agreement for Eskey Creek Project*, 6 June 2022, online: [perma.cc/L856-KPG7] [Tahltan-BC Agreement].

¹⁵³ SC 2021, c 14 [UNDRIP Act].

¹⁵⁴ Department of Justice Canada, *Statement on the 15th Anniversary of the United Nations Declaration on the Rights of Indigenous Peoples* (Ottawa: Department of Justice Canada, 13 September 2022), online: [perma.cc/DEQ3-JW4R].

¹⁵⁵ Department of Justice Canada, *Annual Progress Report on the Implementation of the United Nations Declaration on the Rights of Indigenous Peoples Act* (Ottawa: Department of Justice Canada, June 2022), online: [perma.cc/UU2Q-BPFB].

Since the enactment of *DRIPA* and the *UNDRIP Act*, there has been a limited amount of case law interpreting these pieces of legislation.¹⁵⁶ For example, the British Columbia Court of Appeal noted that *UNDRIP*, *DRIPA*, and the *UNDRIP Act* are relevant to section 25 of the *Charter*.¹⁵⁷ However, the British Columbia Court of Appeal also noted that courts in British Columbia have not decided on the extent to which *UNDRIP* creates substantive rights under section 25 of the *Charter*, and did not do so in this case.¹⁵⁸

B. TAHLTAN CENTRAL GOVERNMENT – B.C. AGREEMENT

In June 2022, as an example of British Columbia’s efforts to integrate free, prior, and informed consent (FPIC) into the environmental assessment process, the Tahltan Central Government and Province of British Columbia signed the *Declaration Act Consent Decision-Making Agreement for Eskay Creek Project*.¹⁵⁹ This agreement was negotiated pursuant to both (1) British Columbia’s *Environmental Assessment Act*,¹⁶⁰ which requires consent for certain reviewable projects,¹⁶¹ and enables the Minister to enter into an agreement with an Indigenous Nation with respect to a provincial environmental assessment;¹⁶² and (2) *DRIPA*, which “may authorize a member of the Executive Council, on behalf of the government, to negotiate and enter into an agreement with an Indigenous governing body” relating to consent.¹⁶³

The agreement pertains to the Eskay Creek Revitalization Project, proposed by Skeena in Tahltan territory, which will be subject to provincial environmental assessment under the *Environmental Assessment Act* and federal impact assessment under the *Impact Assessment Act*.¹⁶⁴ The preamble to the agreement states that it represents an “incremental step in the process of reconciliation,” and that it will inform future consent-based decision-making processes for other proposed projects in Tahltan territory.¹⁶⁵

The consent-based decision-making framework set out in the agreement expressly modifies the provincial environmental assessment process for the purposes of the Eskay Creek Revitalization Project (Eskay Project). It provides for the creation of a “Collaboration Team,” tasked with ensuring that: (1) regular meetings are held between provincial and Tahltan officials; (2) the parties are seeking to achieve consensus at various stages of the process; (3) a consensus tracking tool is created and maintained; (4) appropriate resolution

¹⁵⁶ The 2022 version of this article cites *Thomas and Saik’uz, First Nation v Rio Tinto Alcan Inc*, 2022 BCSC 15. That case was appealed in *Thomas v Rio Tinto Alcan Inc*, 2022 BCCA 415, but the Court of Appeal did not discuss *UNDRIP* or either piece of implementation legislation; Wood et al. “Recent Legislative and Regulatory Developments of Interest to Energy Lawyers” (2022) 60:2 Alta L Rev 607.

¹⁵⁷ *Servatius v Alberni School District No 70*, 2022 BCCA 421 at paras 42–45 [*Servatius*]; *Canadian Charter of Rights and Freedoms*, s 25, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (“[t]he guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples”).

¹⁵⁸ *Servatius*, *ibid* at para 46.

¹⁵⁹ *Tahltan-BC Agreement*, *supra* note 152.

¹⁶⁰ SBC 2018, c 51 [EAA].

¹⁶¹ *Ibid*, s 7.

¹⁶² *Ibid*, s 41.

¹⁶³ *DRIPA*, *supra* note 151, s 7. See also *Required Consent (Eskay Creek Project) Regulation*, BC Reg 139/2022.

¹⁶⁴ *Tahltan-BC Agreement*, *supra* note 152.

¹⁶⁵ *Ibid*, Preamble, para M.

mechanisms are followed when consensus cannot be reached; (5) the parties have the support they need to make decisions regarding the project; (6) Tahltan knowledge and values are reflected in the assessments; and (7) public and community engagement is undertaken in relation to the assessments.¹⁶⁶ Stages where consensus is required include: (1) deciding whether the Eskay Project should proceed to process planning; (2) determining the informational and assessment requirements necessary to support the parties' decision-making; and (3) assessing the draft environmental assessment report and draft assessment certificate, including any associated conditions.¹⁶⁷ Alongside the provincial environmental assessment, the agreement provides for an independent Tahltan Central Government risk assessment which will inform its decision on whether to give consent.¹⁶⁸ That Tahltan Central Government will decide whether to provide FPIC to the project once the provincial assessment is complete. Without FPIC from Tahltan Central Government, the Eskay Project cannot proceed.

The *Tahltan–B.C. Agreement* specifically provides that its purposes include to “provide clarity and transparency” in the assessment and decision-making process,¹⁶⁹ and the guiding principles include predictability and transparency.¹⁷⁰ Whether the agreement will support predictability for businesses and encourage investment in British Columbia, and whether these results can be replicated with other Indigenous governments, remains to be seen.¹⁷¹

C. PROJECTS OWNED BY INDIGENOUS PEOPLES

In 2023, we saw an increase in large-scale Indigenous-owned energy projects. The three examples below illustrate the range of such projects.

1. TILBURY LIQUEFIED NATURAL GAS EXPANSION PROJECT – FORTISBC AND SNUNEYMUXW FIRST NATION AGREEMENT

On 26 January 2023, FortisBC Holdings Inc. (FortisBC) and Snuneymuxw First Nation entered an agreement regarding the Tilbury liquefied natural gas (LNG) projects.¹⁷² The agreement respects Snuneymuxw First Nation's rights in relation to the potential project impacts and represents a commitment to share benefits related to the Tilbury projects. Snuneymuxw First Nation has committed to supporting Tilbury projects, including the Tilbury LNG Storage Expansion Project and the Tilbury Marine Jetty Project.¹⁷³ FortisBC agrees to support Snuneymuxw First Nation's community through educational opportunities, training, and investments in the community.¹⁷⁴

¹⁶⁶ *Ibid.*, s 6.4.

¹⁶⁷ *Tahltan-BC Agreement*, *supra* note 152.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*, s 2.1.

¹⁷⁰ *Ibid.*, s 3.1.

¹⁷¹ Arend JA Hoekstra & Viviana Berkman, “Will the BC/Tahltan Project Consent Agreement Deliver on its Promises?” (21 June 2022), online (blog): *Cassels Brock & Blackwell LLP* [perma.cc/XCX2-SC3W].

¹⁷² FortisBC, Media Release, “Snuneymuxw First Nation and FortisBC Holdings Inc. Sign Agreement for Tilbury LNG Projects, Strengthening Long-Standing Relationship” (27 January 2023), online: [perma.cc/5D3P-KXW4].

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

2. ACFN-CONCORD SOLAR PARTNERSHIP

The Athabasca Chipewyan First Nation (ACFN), through its company, ACFN Green Energy LP, has a 50 percent ownership stake with Concord Green Energy in three large merchant solar farms in Monarch, Vulcan, and Coaldale, Alberta.¹⁷⁵ Together, the three solar farms cover 480 acres and provide 106 megawatts generation capacity.¹⁷⁶ The projects are not on ACFN territory in northern Alberta, but are instead located on Blood Tribe territory in southern Alberta where sunlight conditions are better suited to solar generation.¹⁷⁷ The projects are close to, but not within, the Blood 148 reserve in Cardston County. Members of the Blood Tribe were employed in 50 percent of the labour for construction of the projects, and Blood Tribe members will also be employed in the work maintaining the solar farms.¹⁷⁸ Several other Indigenous subcontractors were employed in relation to the project.

3. CEDAR LNG APPROVAL AND AGREEMENT

On 14 March 2023, the British Columbia Environmental Assessment Office (EAO) issued an Environmental Assessment Certificate (Certificate) for the Cedar LNG Project.¹⁷⁹ The following day, the Minister of Environment and Climate Change issued a positive Decision Statement for the Cedar LNG Project.¹⁸⁰

The Cedar LNG Project (the Project), a proposed floating LNG facility, is Canada's first Indigenous majority-owned LNG facility to receive approval. It comprises a floating LNG export facility and marine terminal to be located on Haisla Nation-owned land in Kitimat, British Columbia, proposed in partnership by Haisla Nation and Pembina Pipeline Corporation (the Partnership).¹⁸¹ The proposed facility will have an estimated exporting capacity of three million tonnes of LNG per year.¹⁸²

The process for issuance of the Certificate satisfied both provincial environmental assessment requirements and federal requirements under the *IAA*, and included consultation with Indigenous peoples and engagement with the public.¹⁸³

As a result of the Partnership's proposed Project design, as well as conditions attached to the Certificate, the EAO found the Project would prevent or reduce potential adverse environmental, economic, social, heritage, or health impacts, such that no significant effects

¹⁷⁵ Greenplanet Energy Analytics, Media Release, "ACFN – Concord Solar Partnership Launches Three Farms" (2022), online: [perma.cc/UW2D-2NZN].

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ British Columbia Environmental Assessment Office, *Environmental Assessment Certificate # E23-01* (Victoria: EAO, 13 March 2023), online: [perma.cc/K767-TQ7Y].

¹⁸⁰ Minister of the Environment, *Decision Statement Issued Under Section 65 of the Impact Assessment Act* (Ottawa: Impact Assessment Agency of Canada, 15 March 2023), online: [perma.cc/EWC7-4YRL].

¹⁸¹ *Ibid.*

¹⁸² Cedar LNG, News Release, "Cedar LNG Receives B.C. Environmental Approval and Signs Memorandum of Understanding with ARC Resources Ltd." (14 March 2023), online: [perma.cc/BW4T-43L6] [Cedar LNG, MOU].

¹⁸³ British Columbia, Ministry of Environment and Climate Change Strategy & Ministry of Energy, Mines and Low Carbon Innovation, *Ministers' Reasons for Decision, Cedar LNG Project* (British Columbia: MECC & MEMLCI, 13 March 2023), online: [perma.cc/33FU-2CFZ] [*Reasons for Decision*].

are expected.¹⁸⁴ The Partnership has introduced several innovative design decisions, as highlighted in the approval, aimed at minimizing the Project's environmental footprint and impacts.¹⁸⁵ Some of the most significant decisions include a proposal to power the facility with renewable electricity from BC Hydro and a proposed Project location leveraging existing LNG infrastructure, a deep-water port, roads, and other infrastructure.¹⁸⁶

A key element to the Project's approval is the general support and lack of opposition to the Project by potentially affected Indigenous communities. In particular, Haisla Nation, as majority owner of the Project, expressed that the advancement of the Project in its territory would advance reconciliation and would have positive effects for Haisla Nation by supporting self-governance and self-determination for Haisla Nation.¹⁸⁷

**D. DUTY TO CONSULT AND LEGISLATIVE POWER:
ASSOCIATION OF IROQUOIS AND ALLIED INDIANS
V. ONTARIO (MINISTER OF ENVIRONMENT,
CONSERVATION AND PARKS)**

This was a decision respecting the Ontario Government's duty to consult before making amendments to Ontario's *Environmental Assessment Act*¹⁸⁸ and revoking Ontario's *Forestry Regulation*.¹⁸⁹ The applicants claimed, among other things, that they were entitled to be, and were not, consulted and accommodated in respect of the revocation of the *Forestry Regulation*.¹⁹⁰

The minority decision, written by Justice Corbett, found that the revocation of the *Forestry Regulation* was executive action rather than the enactment of legislation.¹⁹¹ Justice Corbett outlined the history of the *Forestry Regulation*, finding that the process by which the regulation was enacted was itself a consultation and accommodation process, and as such Ontario did owe the applicants consultation before revoking it.¹⁹²

The majority applied *Mikisew Cree First Nation v. Canada (Governor General in Council)*,¹⁹³ and found that the Crown did not have a constitutional duty to consult, and that if there was a duty to consult it would be at the low end of the spectrum and was satisfied in this case.¹⁹⁴ Further, the revocation of the *Forestry Regulation* did not make structural changes to the management of forestry resources that could trigger a duty to consult and did not remove or reduce the Crown's consultation obligations with respect to future decisions

¹⁸⁴ *Ibid* at 2.

¹⁸⁵ *Ibid* at 3; Cedar LNG, MOU, *supra* note 182.

¹⁸⁶ Cedar LNG, MOU, *ibid*.

¹⁸⁷ *Reasons for Decision*, *supra* note 183 at 3.

¹⁸⁸ RSO 1990, c E.18.

¹⁸⁹ *Association of Iroquois and Allied Indians*, *supra* note 149; Ontario, Ministry of the Environment, Conservation and Parks, *Environmental Assessment Requirements for Forest Management on Crown Lands in Ontario*, Declaration Order MNR-75 (Toronto: Ministry of the Environment and Climate Change, 25 August 2015), online: [perma.cc/L7EE-ZZDS] (revoked).

¹⁹⁰ *Association of Iroquois and Allied Indians*, *ibid*.

¹⁹¹ *Ibid* at para 21.

¹⁹² *Ibid* at paras 78–79, Corbett J (dissenting in part). Note that majority decision comes after the dissenting decision.

¹⁹³ 2018 SCC 40.

¹⁹⁴ *Association of Iroquois and Allied Indians*, *supra* note 149 at para 1, Corbett J (dissenting in part).

on forestry management that affect Indigenous communities.¹⁹⁵ The applicants would have “an ongoing right” to be consulted with respect to changes to decisions that may impact their Aboriginal and treaty rights.¹⁹⁶

E. INJUNCTIVE RELIEF FOR ASSERTED BUT UNPROVEN ABORIGINAL TITLE CLAIMS: *REECE V. CANADA (ATTORNEY GENERAL)*

The plaintiffs in this case were a collection of Tsimshian nations referred to as the Allied Tribes who sought an injunction preventing the defendant Crown from transferring certain provincial Crown lands in northwestern British Columbia to the defendant Nisga’a Nation, and preventing the addition of the lands to the Nisga’a Lands as defined in the *Nisga’a Final Agreement*.¹⁹⁷ The plaintiffs claim that they hold Aboriginal title throughout the lands.¹⁹⁸ The Aboriginal title claim has not yet been resolved, and title to the lands is contested among the Allied Tribes and the Nisga’a.¹⁹⁹ The British Columbia Supreme Court granted the Allied Tribes’ request for an interlocutory injunction enjoining British Columbia’s transfer of the lands to the Nisga’a for a period of 18 months.²⁰⁰

The Nisga’a, the Province of British Columbia, and the Attorney General of Canada appealed the British Columbia Supreme Court decision. In June 2023, the British Columbia Court of Appeal allowed the appeal and set aside the injunction, citing a variety of errors in the British Columbia Supreme Court decision but giving particular weight to the interruption in the consultation process that the injunction caused.²⁰¹

VII. OIL AND GAS

The more significant developments in the oil and gas sector show a tension between the need for further development to meet consumer demand and the development of tools to better address reclamation liability. Recent regulatory approvals have found oil and gas projects to be justified in the need to satisfy existing and growing demand and their economic sustainability. However, governments continue to implement liability management regimes in recognition of the growing need for more stringent mechanisms to ensure the reclamation of sites.

¹⁹⁵ *Ibid* at para 24.

¹⁹⁶ *Ibid* at para 31.

¹⁹⁷ 27 April 1999, online: *Nisga’a Lisims Government* [perma.cc/QUK2-MCPL]; *Reece* BCSC, *supra* note 150.

¹⁹⁸ *Ibid* at para 5.

¹⁹⁹ *Reece* BCCA, *supra* note 150 at para 3.

²⁰⁰ *Reece* BCSC, *supra* note 150 at para 157.

²⁰¹ *Reece* BCCA, *supra* note 150 at paras 106, 42–86. The British Columbia Court of Appeal noted at para 35 that the standard of review of a decision to grant an interlocutory injunction is highly deferential. The British Columbia Court of Appeal decision has not been appealed to the Supreme Court of Canada.

A. ALBERTA'S LIABILITY MANAGEMENT INCENTIVE PROGRAM

In February 2023, Alberta commenced engagement on a new Liability Management Incentive Program (Incentive Program).²⁰² The goal for the Incentive Program is in line with previous overhauls of Alberta's liability management framework, seeking improvements in the management of site liability, including in respect of orphan sites.

The Incentive Program would provide up to \$100 million in credits over a three-year period for qualified companies that remediate sites that have been inactive for at least 20 years.²⁰³ Companies would earn credits that could be applied against royalties earned from new production and deducted by Alberta from a company to develop the associated resource.²⁰⁴ Alberta has indicated that the Incentive Program would be applied to all well sites in the province, including the orphan well inventory.²⁰⁵

While Alberta has yet to release detailed information about the mechanics of the proposed Incentive Program, analysts have criticized its concept and timing, arguing that it provides taxpayer-funded benefits to oil companies that are already legally required to remediate sites at a time of high oil prices.²⁰⁶ Some analysts further argue that the Incentive Program would fail to comply with Alberta law by deviating from the polluter-pay principle.²⁰⁷

Alberta has indicated that the Incentive Program is still in development, with further consultation planned in the future.²⁰⁸

B. AER DIRECTIVES

On 13 February 2023, the AER released amendments to *Directive 088: Licensee Life-Cycle Management*.²⁰⁹ *Directive 088* provides a regulated liability management system throughout the energy development lifecycle for Alberta oil and gas licence holders.²¹⁰ The implementation of this new liability management framework is intended to mitigate the billions of dollars of liability associated with inactive and orphaned wells in Alberta.

²⁰² Alberta, News Release, "Rehabilitating Problematic Oil and Gas Sites: Statement from Premier Smith" (22 February 2023), online: [perma.cc/4ZWB-LWY9] [Alberta, Premier Smith's Statement].

²⁰³ *Ibid.* For a more comprehensive review of Alberta's Oil And Gas Liability Management Framework: see Jeremy Barretto et al., "Leading the Way? Liability Management for the Alberta Oil and Gas Industry" (2022) 60:2 *Alta L Rev* 487.

²⁰⁴ Alberta, Premier Smith's Statement, *ibid.*; Bob Weber, "Alberta to Pilot Oil and Gas Tax Breaks for Legally Required Cleanup of Abandoned Wells," *Financial Post* (8 February 2023), online: [perma.cc/PV8V-727R].

²⁰⁵ Alberta, Premier Smith's Statement, *ibid.*; Jordan Kanygin, "'Corporate Welfare and Misguided': Criticism Continues About Alberta's Proposed Oil Well Cleanup Incentive," *CTV News* (13 February 2023), online: [perma.cc/YRR3-QFST].

²⁰⁶ Weber, *supra* note 204.

²⁰⁷ Kanygin, *supra* note 205.

²⁰⁸ Alberta, Premier Smith's Statement, *supra* note 202.

²⁰⁹ Alberta Energy Regulator, News Release, Bulletin 2023-04, "New Editions of *Directive 088* and *Manual 023*" (13 February 2023), online: [perma.cc/6TP8-LZDQ]; Alberta Energy Regulator, *Directive 088: Licensee Life-Cycle Management* (Calgary: AER, 13 February 2023), online: [perma.cc/298V-J2V9] [*Directive 088*].

²¹⁰ *Directive 088, ibid.*

Directive 088 details how the AER will holistically assess each licensee to determine whether to approve licence transfers or pursue specific regulatory action.²¹¹

The February 2023 revisions to *Directive 088* include the introduction of a closure nomination program, the provision of an opportunity for eligible requesters (for example, private landowners, First Nations, and other stakeholders) to request the closure of a site in line with Alberta's oil and gas liability management framework, and a description of the closure plan approaches that a licensee may use when a site becomes eligible for the program and requires a closure plan.²¹²

Directive 058: Oilfield Waste Management Requirements for the Upstream Petroleum Industry provides for waste characterization and classification, which includes an assessment of the physical, chemical, and toxicological properties of a waste, as well as the dangers relating to that waste.²¹³ The AER uses the terminology of non-dangerous oilfield waste (non-DOW) and dangerous oilfield waste (DOW) to classify waste. Any oilfield waste generator must classify its waste.

**C. Foothills Pipe Lines (South B.C.) Ltd.
Foothills Zone 8 West Path Delivery
2023 Project Approval**

On 2 March 2022, the Commission of the CER issued a decision (*Foothills CER Letter Decision*) approving an application by Foothills Pipe Lines (South B.C.) Ltd. (Foothills) to construct and operate the Foothills Zone 8 West Path Delivery 2023 Project (Foothills Project).²¹⁴ The Foothills Project includes the construction and operation of a single loop of approximately 32 kilometres of natural gas pipeline connecting to the existing British Columbia Mainline and the Foothills South British Columbia Pipeline.²¹⁵

Following a process involving potentially affected Indigenous peoples and interested parties, the Commission granted Foothills an exemption under section 214 of the *Canadian Energy Regulator Act*²¹⁶ from the application of section 180(1)(a) of the *CER Act* (requiring the issuance of a certificate for operation of a pipeline), and section 198 of the *CER Act*, requiring the issuance of a certificate as well as approval of a plan, profile, and book of reference prior to construction of a pipeline, among other requirements.²¹⁷ The effect of these exemptions was the approval of the Foothills Project.²¹⁸

²¹¹ For a more detailed analysis of the AER Liability Management Regime: see e.g. Barretto et al, *supra* note 203.

²¹² *Directive 088*, *supra* note 209, s 4.2.

²¹³ Alberta Energy Regulator, *Directive 058: Oilfield Waste Management Requirements for the Upstream Petroleum Industry* (Calgary: AER, 7 October 2022), online: [perma.cc/Q7WX-5P6J].

²¹⁴ Canada Energy Regulator, *Letter Decision*, File OF-Fac-Gas-F111-2020-02 02 (Calgary: CER, 2 March 2022), online: [perma.cc/EY3A-NUDV] [*Foothills CER Letter Decision*]; Canada Energy Regulator, *Order XG-002-2022*, File OF-Fac-Gas-F111-2020-02 02 (Calgary: CER, 2 March 2022), online: [perma.cc/R7D7-E2ZX].

²¹⁵ *Foothills CER Letter Decision*, *ibid* at 2.

²¹⁶ *Canadian Energy Regulator Act*, SC 2019, c 28, s 10 [*CER Act*].

²¹⁷ *Foothills CER Letter Decision*, *supra* note 214 at 1–2.

²¹⁸ *Ibid* at 2.

In the *Foothills CER Letter Decision*, the Commission concluded that Crown consultation on the Foothills Project was sufficient and that its decision is consistent with section 35 of the *Constitution Act, 1982*.²¹⁹ The Commission further found that, during construction, the Foothills Project is likely to temporarily impact Indigenous peoples' ability to exercise their section 35 rights, but that Foothills adequately considered these impacts and minimized them where possible through its design for the Foothills Project. The Commission imposed conditions to address and monitor potential impacts.²²⁰ The Commission considered new regulatory requirements for gender-based impacts and concluded that Foothills appropriately addressed requirements with respect to the intersection of sex and gender with other identify factors, including Indigeneity.²²¹

The Commission determined under section 82 of the *IAA* that, taking into consideration mitigation measures proposed by Foothills and conditions imposed by the Commission, the project is not likely to cause significant adverse environmental effects on federal lands affected by the Foothills Project.²²²

VIII. JURISDICTION

The Alberta government pushed back against what it sees as improper federal intrusion into provincial jurisdiction through enacting the *Alberta Sovereignty Within a United Canada Act*,²²³ and through the Alberta Court of Appeal's decision finding the *IAA* is ultra vires Parliament.²²⁴ It remains to be seen in 2023 how the *Alberta Sovereignty Act* will be utilized in practice and how the Supreme Court of Canada will decide as the final voice in the *IAA Reference* case.

A. ALBERTA SOVEREIGNTY ACT

Keeping a promise Premier Danielle Smith made during her June 2022 campaign for leadership of the United Conservative Party, the *Alberta Sovereignty Act* came into force in December 2022.²²⁵

The *Alberta Sovereignty Act* enables the legislative assembly of Alberta to approve a resolution of a member of the executive council that a federal initiative is unconstitutional,

²¹⁹ *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; *Foothills CER Letter Decision*, *ibid* at 9.

²²⁰ *Foothills CER Letter Decision*, *ibid*.

²²¹ *Ibid* at 18.

²²² *Ibid* at 23.

²²³ SA 2022, c A-33.8 [*Alberta Sovereignty Act*].

²²⁴ Reference re *Impact Assessment Act*, 2022 ABCA 165 [*IAA Reference*].

²²⁵ *Alberta Sovereignty Act*, supra note 223. In the *Alberta Sovereignty Act*'s original proposed form in November 2022, Bill 1, received widespread criticism from legal scholars for offending constitutional principles. See e.g. Martin Olszynski & Nigel Bankes, "Running Afoul the Separation, Division, and Delegation of Powers: The Alberta Sovereignty Within a United Canada Act" (6 December 2022), online (blog): *ABlawg* [perma.cc/3K8B-4BYM]; Eric M Adams, "Danielle Smith Didn't Give Us a Watered-Down Version of Alberta's Sovereignty Act," *CBC News* (29 November 2022), online: [perma.cc/9YHP-NKUN]; Emmett MacFarlane, "The Most Unconstitutional Bill in Canada's Modern History" (30 November 2022), online (blog): *Emmett MacFarlane* [perma.cc/3SWS-UCRJ]. Amendments to the Bill on 7 December 2022 mitigated some concerns, such as removing Cabinet's ability to circumvent the ordinary legislative process: see Bill 1, Amendment A1, *Amendments to Bill 1: Alberta Sovereignty Within a United Canada Act*, 30th Sess, 4th Leg, Alberta (agreed to 7 December 2022) [*Amendment A1*].

at which point Cabinet may make orders pursuant to that resolution.²²⁶ The orders of Cabinet may direct a minister to suspend or modify the application or operation of provisions, or supplement or replace the provisions, of a regulation authorized by the impugned federal enactment.²²⁷ Cabinet may also direct a minister to exercise a power, duty, or function of that minister, or issue directives to a provincial entity and the Crown in respect of the federal initiative.²²⁸

The *Alberta Sovereignty Act* contains a “[n]o cause of action” clause, which bars claims against a person or entity acting in good faith under a directive issued under the *Alberta Sovereignty Act*.²²⁹ However, judicial review of decisions and actions under the *Alberta Sovereignty Act* are permitted.²³⁰

It remains to be seen how the *Alberta Sovereignty Act* will be applied in practice, whether a Court will determine the *Alberta Sovereignty Act* to be unconstitutional, and how Cabinet orders under the *Alberta Sovereignty Act* will stand up to judicial scrutiny.

B. IMPACT ASSESSMENT ACT REFERENCE

In May 2022, a majority of the Alberta Court of Appeal ruled that the *IAA* was unconstitutional.²³¹ Chief Justice Fraser, and Justices Watson and McDonald, with Justice Strekaf concurring in a separate opinion, found the *IAA* and its regulations to be ultra vires because they interfere with provincial jurisdiction over natural resources and other matters under section 92 and 92A of the *Constitution Act, 1867*.²³² Justice Greckol dissented, finding that the *IAA* was constitutional.²³³ The federal government appealed the decision to the Supreme Court of Canada and, in March 2023, the Supreme Court heard arguments as to whether the federal government overstepped its constitutional powers in enacting the *IAA*.²³⁴ On 13 October 2023, the Supreme Court of Canada ruled that the federal government’s new impact assessment regime was largely unconstitutional, as it extended beyond Parliament’s constitutional authority. The Supreme Court majority determined that the designated projects scheme of the *IAA* fell outside of the federal government’s jurisdiction. The federal government accepted the results and advised that it intends to provide guidance to stakeholders for affected projects.²³⁵

IX. STANDARD OF REVIEW

This section highlights recent clarifications to choosing and applying the standard of review in judicial reviews and statutory appeals. It also provides an update on the more general administrative law question of whether judicial review is available, in light of

²²⁶ *Alberta Sovereignty Act*, *ibid*, ss 3–4.

²²⁷ *Ibid*, s 4 (as amended: see also *Amendment A1*, *supra* note 225).

²²⁸ *Ibid*, ss 4(1)(b)–(c) (as amended: see also *Amendment A1*, *ibid*).

²²⁹ *Ibid*, s 8.

²³⁰ *Ibid*, s 9.

²³¹ *IAA Reference*, *supra* note 224.

²³² *Ibid* at paras 32, 425.

²³³ *Ibid* at para 765.

²³⁴ *Attorney General of Canada v Attorney General of Alberta*, SCC File No 40195.

²³⁵ Raivo Uukkivi et al, “What Now? The Supreme Court of Canada Finds the *Federal Impact Assessment Act* Largely Unconstitutional” (16 October 2023), online: [perma.cc/YX67-HJWQ].

statutory bars to judicial review and the common law bar against premature judicial review applications.

A. JUDICIAL REVIEW OF REGULATIONS

1. *INNOVATIVE MEDICINES CANADA* *v. CANADA (ATTORNEY GENERAL)*

This was an appeal of a Federal Court judicial review in which the appellants challenged portions of a regulation that amended the *Patented Medicines Regulations*.²³⁶ The appellants had argued that portions of the regulation were invalid because they went beyond the scope of the regulation-making power in the enabling legislation.²³⁷ On judicial review, the Federal Court had concluded that the Governor in Council's decision to enact the impugned section was reasonable.²³⁸ The Federal Court of Appeal dismissed the appeal, agreeing with the lower court that the decision to make the regulation was reasonable.²³⁹

In coming to its conclusion, the Federal Court of Appeal followed *Portnov v. Canada (Attorney General)*²⁴⁰ in assessing the validity of the regulations, rather than the methodology in *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*.²⁴¹ *Portnov* requires a court reviewing the validity of regulations to follow *Canada (Minister of Citizenship and Immigration) v. Vavilov*.²⁴² Of the difference between applying these two cases, the Federal Court of Appeal says:

This matters. Under *Vavilov*, as suggested in *Portnov*, we conduct reasonableness review of the decision to enact the regulation to change the comparator countries. Though the challenger bears the burden of proving that the decision is unreasonable under *Vavilov*, the challenger does not have to overcome a presumption the decision is reasonable. Under *Katz*, the challenger must overcome a presumption the regulation is valid: *Katz* at para. 25. It can be overcome only if the regulation is “irrelevant”, “extraneous” or “completely unrelated” to the “statutory purpose”: *Katz* at paras 24 and 28. Reasonableness review does not enter into the matter at all. This is a “hyperdeferential” test, one unique in all of administrative law: Daly, “Regulations and Reasonableness Review”, above.²⁴³

²³⁶ SOR/94-688, amended by *Regulations Amending the Patented Medicines Regulations (Additional Factors and Information Reporting Requirements)*, SOR/2019-298; *Innovative Medicines Canada v Canada (Attorney General)*, 2022 FCA 210 [*Innovative Medicines FCA*].

²³⁷ *Innovative Medicines FCA*, *ibid.* Patent Act, RSC 1985, c P-4.

²³⁸ *Innovative Medicines FCA*, *ibid.* at para 6; *Innovative Medicines Canada v Canada (Attorney General)*, 2020 FC 725.

²³⁹ *Innovative Medicines FCA*, *ibid.* at para 63.

²⁴⁰ 2021 FCA 171 [*Portnov*].

²⁴¹ 2013 SCC 64 [*Katz*].

²⁴² 2019 SCC 65 [*Vavilov*].

²⁴³ *Innovative Medicines FCA*, *supra* note 236 at para 30.

Until the Supreme Court brings clarity to this issue, reasonableness review applies to the validity of regulations in the federal courts (as well as in British Columbia²⁴⁴) whereas the “hyperdeferential” approach in *Katz* applies in the Alberta courts (and Ontario²⁴⁵).

2. *AUER V. AUER AND TRANSALTA GENERATION PARTNERSHIP
V. ALBERTA (MINISTER OF MUNICIPAL AFFAIRS)*

In both *Auer v. Auer*²⁴⁶ and *TransAlta Generation Partnership v. Alberta (Minister of Municipal Affairs)*,²⁴⁷ the Alberta Court of Appeal rejected the applicability of *Vavilov* and *Portnov* to the review of regulations, and instead applied the hyperdeferential standard from *Katz*.

B. STANDARD OF REVIEW FOR PROCEDURAL FAIRNESS

1. *LAW SOCIETY OF SASKATCHEWAN V. ABRAMETZ*

In this case, the appellant, the Law Society of Saskatchewan, found the respondent, Mr. Abrametz, guilty of charges of conduct unbecoming a lawyer and disbarred him without a right to apply for readmission for close to two years.²⁴⁸ During the disciplinary proceedings, Abrametz applied to the Law Society for a stay of proceedings on the basis of “inordinate delay amounting to an abuse of process.”²⁴⁹ The Hearing Committee for the Law Society dismissed the application; however, the Court of Appeal of Saskatchewan subsequently allowed an appeal from that decision, and the Law Society then sought leave to appeal the Court of Appeal’s decision to the Supreme Court of Canada. The Supreme Court dismissed the appeal, having found there had been no abuse of process.²⁵⁰

In the Supreme Court’s decision, it also clarified the standard of review applicable to questions of procedural fairness and to abuse of process in statutory appeals. Where questions of procedural fairness, including abuse of process, are dealt with through a statutory appeal mechanism, they are subject to the appellate standards of review.²⁵¹ Whether there has been an abuse of process is a question of law, to which the correctness standard applies.²⁵²

²⁴⁴ *Pacific Wild Alliance v British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)*, 2022 BCSC 904 at paras 68–76. However, in *Le v British Columbia (Attorney General)*, 2022 BCSC 1146, the British Columbia Supreme Court differentiated between challenges to the vires of regulations, in which case *Katz* applies (*ibid* at paras 49–50), and other forms of delegated legislation such as municipal bylaws in which case the reasonableness standard applies (*ibid* at paras 51–60).

²⁴⁵ *TransCanada Pipelines Ltd v Ontario (Minister of Finance)*, 2022 ONSC 4432 at paras 5–8.

²⁴⁶ 2022 ABCA 375 at para 7 [*Auer*].

²⁴⁷ 2022 ABCA 381 at paras 46–53 [*TransAlta*].

²⁴⁸ *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 [*Abrametz*].

²⁴⁹ *Ibid* at para 2.

²⁵⁰ *Ibid* at para 125.

²⁵¹ *Ibid* at para 27, citing *Vavilov*, *supra* note 242 at paras 33, 36–52. See also *Abrametz*, *ibid* at para 38.

²⁵² *Ibid* at para 30. In *Manitoba Métis Federation Inc v Canada (Energy Regulator)*, the Federal Court of Appeal confirmed that the standard of review applicable to questions of procedural fairness in a statutory appeal is correctness, in the context of a statutory appeal of a CER decision: (2023 FCA 24). As well, in a recent Saskatchewan carbon capture contracting dispute, the Court of King’s Bench applied the appellate correctness standard to an application to have an arbitration award set aside on procedural fairness grounds, despite that the application was neither a statutory appeal nor judicial review (*SNC-Lavalin Inc v Saskatchewan Power Corporation*, 2022 SKKB 242 at paras 22–32).

C. ADDITIONAL CATEGORY OF CORRECTNESS STANDARD

1. *SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF CANADA V. ENTERTAINMENT SOFTWARE ASSOCIATION*

In *Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association*,²⁵³ the Supreme Court of Canada identified an additional exception to the presumption of reasonableness review set out in *Vavilov*. The Supreme Court found that courts should apply a correctness standard of review in situations where a statute gives courts and administrative bodies concurrent first instance jurisdiction over a legal issue.²⁵⁴ The correctness standard had previously applied in such situations pre-*Vavilov*,²⁵⁵ and the Supreme Court clarified in *ESA* that “this is one of those rare and exceptional circumstances where it is appropriate to recognize a new category of correctness review” post-*Vavilov*.²⁵⁶

D. STATUTORY RESTRICTIONS ON JUDICIAL REVIEW

The availability of judicial review in the face of statutory restrictions is not a standard of review issue, but is nonetheless relevant. In *Democracy Watch v. Canada (Attorney General)*,²⁵⁷ the Federal Court of Appeal ruled that a complete bar on the availability of judicial review would offend the rule of law.²⁵⁸ However, only total bars against review, not partial restrictions on review, are invalid.²⁵⁹

E. BAR AGAINST PREMATURE JUDICIAL REVIEWS

The Federal Court of Appeal confirmed in *Viaguard Accu-Metrics Laboratory v. Standards Council of Canada* that judicial review is only available after a party has exhausted all other administrative remedies.²⁶⁰ The Federal Court of Appeal confirmed that the bar against premature judicial reviews is “next to absolute.”²⁶¹

F. OTHER STANDARD OF REVIEW CASES IN ENERGY LAW

1. *ATCO ELECTRIC LTD. V. ALBERTA UTILITIES COMMISSION*

This was an appeal of a decision of the AUC, which denied the appellant the ability to recover costs it suffered as a result of the Fort McMurray wildfire through including those costs in its prudently incurred costs and expenses when setting its rates.²⁶² The Alberta Court

²⁵³ 2022 SCC 30 [*ESA*].

²⁵⁴ *Ibid* at paras 26–28.

²⁵⁵ *Ibid* at para 22, citing *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 at para 15; *Canadian Broadcasting Corp v SODRAC 2003 Inc*, 2015 SCC 57 at para 35.

²⁵⁶ *ESA*, *supra* note 253 at para 28.

²⁵⁷ 2022 FCA 208 at para 31 [*Democracy Watch*].

²⁵⁸ *Ibid* at para 31, citing *Canada (Attorney General) v Best Buy Canada Ltd*, 2021 FCA 161 at para 112. See also *Democracy Watch*, *ibid* at paras 42–43.

²⁵⁹ *Democracy Watch*, *ibid* at para 35, citing *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 72 at paras 102–103.

²⁶⁰ 2023 FCA 63 at para 3.

²⁶¹ *Ibid* at para 4, citing *Dugré v Canada (Attorney General)*, 2021 FCA 8 at para 37.

²⁶² *ATCO Electric Ltd v Alberta Utilities Commission*, 2023 ABCA 129.

of Appeal allowed the appeal, and referred the matter back to the AUC, finding that the AUC had made an error of law in relation to its own discretion on what expenses can be recoverable in the case of stranded or unpredictably destroyed assets.²⁶³

In this case, the Court made comments about the status of older Court of Appeal decisions post-*Vavilov*, stating that “binding precedents of this Court should presumptively be regarded as continuing to be binding, notwithstanding the change in the standard of review analysis.”²⁶⁴ This has implications for the precedential value of statutory appeals of AUC decisions, which had previously been assessed on a reasonableness standard pre-*Vavilov*, but are now assessed on the appellate standards.

2. *TAYLOR PROCESSING INC.*
V. ALBERTA (MINISTER OF ENERGY)

The Alberta Court of King’s Bench conducted a reasonableness analysis on four judicial review applications arising from Alberta Energy’s calculation of royalties in respect of gas processing at the Harmattan Gas Processing Plant, and applied the correctness standard to issues of procedural fairness and adequacy of reasons, ultimately quashing the impugned decisions.²⁶⁵

3. *WCSB POWER ALBERTA LIMITED PARTNERSHIP*
V. ALBERTA UTILITIES COMMISSION

In a permission to appeal decision regarding two decisions of the AUC, the Alberta Court of Appeal noted that the reasonableness standard applies to challenges to the regulator’s discretion as to procedure, and correctness applies to the regulator’s rulings on admissibility of evidence as well as questions of procedural fairness.²⁶⁶

4. *FIRST NATION OF NA-CHO NYÄK DUN*
V. YUKON (GOVERNMENT OF)

The Yukon Supreme Court discussed which standard to apply to questions about the honour of the Crown and duty to consult in a case considering the processes used to resolve land use conflicts in the Yukon.²⁶⁷ The Court applied the standard of correctness to the question of whether the honour of the Crown was engaged by: (1) the decision under review; (2) the existence, extent, and content of the duty to consult; and (3) the Yukon government’s interpretation of the First Nation’s constitutionally protected treaty rights.²⁶⁸ The Court applied the reasonableness standard to the question of whether the duty to consult was

²⁶³ *Ibid* at paras 61–62.

²⁶⁴ *Ibid* at para 18. This aspect of the Court’s decision has attracted some criticism: see e.g. Nigel Bankes, “Stores Block Meets *Vavilov*: The Status of Pre-*Vavilov* ABCA Decisions” (1 May 2023), online (blog): *ABlawg* [perma.cc/EYY3-9NHF].

²⁶⁵ *Taylor Processing Inc v Alberta (Minister of Energy)*, 2023 ABKB 64.

²⁶⁶ *WCSB Power Alberta Limited Partnership v Alberta Utilities Commission*, 2022 ABCA 177.

²⁶⁷ *First Nation of Na-Cho Nyäk Dun v Yukon (Government of)*, 2023 YKSC 5.

²⁶⁸ *Ibid* at para 72.

adequate and to the merits of the decision, as well as to whether or not there was a contractual duty of good faith.²⁶⁹

5. *REDMOND V. BRITISH COLUMBIA (FORESTS, LANDS, NATURAL RESOURCES OPERATIONS AND RURAL DEVELOPMENT)*

In British Columbia, the British Columbia Court of Appeal applied the finding from *Vavilov*, that when administrative action is alleged to limit *Charter* rights, a reviewing court should apply the reasonableness standard.²⁷⁰ This is different than when the applicant alleges that the enabling statute itself is unconstitutional, in which case the standard is correctness.²⁷¹

X. CONCLUSION

This article provided an overview of regulatory and legislative developments of interest to Canadian energy lawyers over the past year. These developments include: (1) the ongoing jurisdictional battle between provinces and the federal government, as reflected in the *Alberta Sovereignty Act* and the pending decision of the Supreme Court of Canada on the *IAA Reference* case; (2) continued federal and provincial efforts to decarbonize through policy, legislation, and regulations; (3) progress towards *UNDRIP* implementation across Canada, all while Indigenous-owned energy projects continue to see expansion; (4) a shifting landscape with respect to how cumulative effects are dealt with in duty to consult cases; (5) developments in the regulation of oil and gas pipelines, power, and hydrogen; and (6) continued clarification and application of the standard of review post-*Vavilov*.

²⁶⁹ *Ibid* at paras 73–74.

²⁷⁰ *Redmond v British Columbia (Forests, Lands, Natural Resources Operations and Rural Development)*, 2022 BCCA 72 at para 46. In this case, the British Columbia Court of Appeal applied the appellate standard to the reviewing Court's decision on *Charter* infringement because the issue was raised first before the reviewing judge, and not before the administrative decision-maker.

²⁷¹ *Ibid*.