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Recent Legislative and Regulatory
Developments of Interest to Energy Lawyers

CELF - JASPER RESEARCH SEMINAR 2023

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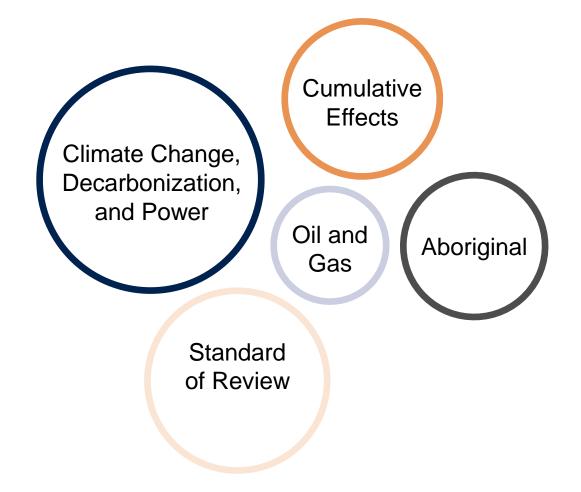


Agenda

- 1. Introduction
- 2. Climate Change, Decarbonization & Power
- 3. Cumulative Effects
- 4. Aboriginal
- 5. Oil and Gas
- 6. Standard of Review
- 7. Conclusion



Introduction









Authors



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Climate Change, Decarbonization & Power Key Takeaways



- 1. Canada's and Provinces' aggressive steps towards net-zero electricity
- 2. New legislation and policies on GHGs and alternative energy
- 3. Forecasts for increased electricity needs
- 4. Regional transmission initiatives to maximize flow of clean electricity









Takeaway 1 Canada's & Provinces' aggressive steps toward net-zero electricity



- Canada's 2030 Emissions Reduction Plan GHG to be reduced by 40-45% below 2005 levels by 2030
 - Requires net-zero electricity by 2035 through Clean Electricity Regulations (not yet in force)
 - Canada's electricity currently 82% non-emitting, but energy mix varies greatly by region
 - Next steps: expand non-emitting energy development, connect regions to clean power
- Provinces
 - Alberta, New Brunswick, Ontario & Saskatchewan agreed to a joint strategic plan for Small Nuclear Reactors (March 2022)
 - Enactment of Alberta Geothermal Resource Development Rules (August 2022)
 - Virtual power purchase agreements, e.g., Campbell Soup Co./Enel North America
- Forecasts for increased electricity demand and broader range of supply options





Takeaway 2 Governments enact new legislation and policies to reduce GHG emissions and incent renewable energy and hydrogen



- Federal Clean Fuel Regulation (June 2022):
 - Sets strict requirements for fuels' carbon intensity ("CI")
 - Establishes a credit market to incentivize low CI fuels
- Canadian GHG Offset Credit System Regulations (June 2022)
- Amendments to Technology Innovations and Emissions Reduction Regulation ("TIER"):
 - Brings TIER in line with minimal federal stringency standards
 - Creates carbon capture, utilization and storage credits
- British Columbia, Low Carbon Fuels Act (January 2024)
- Canada and Provinces (BC, Alberta, Ontario) are rapidly developing hydrogen strategies



Takeaway 3 Forecasts project increased electricity needs and broader range of supply options



- Electricity market operators and other organizations across Canada have published their long-term forecasts for electricity supply and demand
 - IESO Annual Planning Outlook, Ontario's Electricity System needs:
 - Forecast of strong and steady growth of electricity demands from emerging areas (e.g., CCUS) through the end of the 2030s
 - Demand is fueled by industrial sector development in the mid 2020s (mining, steel, electric vehicle battery and hydrogen production)
- Other, Similar Forecasts
 - AESO, Net-Zero Emissions Pathways Report
 - CER, Canada's Energy Future 2023



Takeaway 4 Regional transmission initiatives are being explored to maximize flow of clean electricity between provinces



- The Atlantic Loop Project ("Atlantic Loop") proposed project to connect the Atlantic Provinces to hydroelectricity from Quebec and Newfoundland & Labrador
 - Atlantic Loop Details and Update:
 - Includes 800 km of overhead powerline (mostly through New Brunswick)
 - It is a key component for Nova Scotia to phase out coal fired generation
 - In the 2023 Federal Budget, the Federal Government committed to advancing the Atlantic Loop; stating negotiations with provinces and utilities are underway
- Other relevant transmission projects approved
 - The Appalaches-Maine Interconnection Line Project
 - Hydro One's transmission line project between Chatham-Kent and Lakeshore and the County of Essex



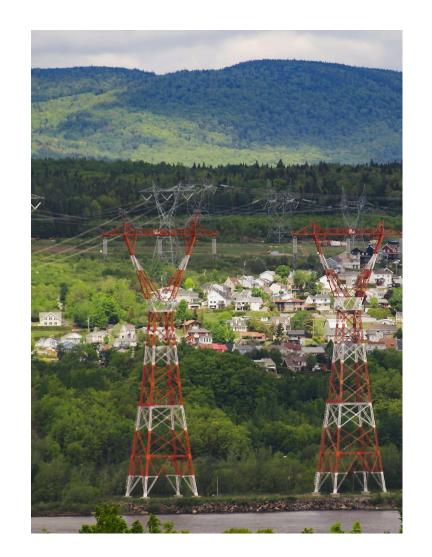




Cumulative Effects



- Effects of (a) past, (b) present and (c) reasonably foreseeable future development on the environment + impacts on the exercise of Indigenous rights on that environment = cumulative effects
- Yahey is changing the law of cumulative effects but only in the narrow context of treaty infringement claims
- 3. Two trends arising from *Yahey*: (a) co-management and joint-decision making on treaty lands; and (b) litigation inspired by *Yahey*







Takeaway 1: Co-management & Joint decision-making - Blueberry River / BC Implementation Agreement following *Yahey*

- BC did not appeal Yahey; initiated negotiations with Blueberry River
- Blueberry River/BC 2023 Implementation Agreement
 - Key concept that guided negotiations for the agreement was Blueberry River's "way of life", characterized by two elements: (a) free movement across their territory; and (b) environmental protection for key traditional areas
 - Measures under the agreement can be summarized as co-management between the Province and Blueberry River of the lands subject to the claim, both in land planning and decision-making
- Unique framework in BC towards reconciliation with the incorporation of UNDRIP into law and the move towards joint decision-making in alignment with FPIC





Takeaway 2: Treaty Infringement Litigation Inspired by *Yahey*



- Yahey will likely have impacts in other areas with historic numbered treaties similar to
 Treaty 8 in the Prairies and northern Ontario (e.g., Treaty 6, Treaty 4 and Treaty 9). Many
 of these areas have experienced significant population growth and resource development
 since the execution of the historic treaties
- Various Indigenous communities have brought claims under these treaties relying on Yahey and seeking relief similar to that granted in Yahey:
 - Duncan's First Nation Claim Claim against Alberta for infringement of Treaty 8
 - Missanabie Cree First Nation, Brunswick House First Nation and Chapleau Cree First Nation Claim – Claim against Ontario for infringement of Treaty 9

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The Future of Cumulative Effects?



What <i>Yahey</i> is about	What Yahey is NOT about
 Treaty infringement claims Within a fact-specific context and evidentiary record For traditional lands in British Columbia, where UNDRIP has been incorporated into law and existing trend towards co-management 	 Claims for infringement of Aboriginal rights Consideration of cumulative effects in the context of broader statutory goals Guidance for project proponents on environmental assessment requirements

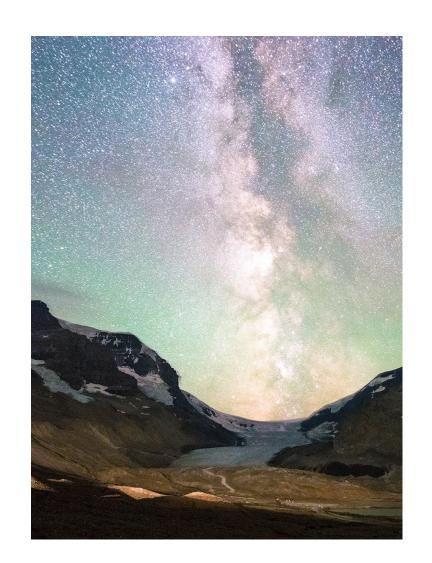




Aboriginal Key Takeaways



- Tahltan Central Government/BC consentbased decision-making agreement
- 2. Indigenous-owned projects continue to proliferate
- 3. Ontario Superior Court confirms no duty to consult on legislation
- 4. Injunctive relief for asserted but unproven Aboriginal title claim



Takeaway 1 Tahltan Central Government and BC entered agreement for consent-based decision-making on Eskay Creek Project



- In June 2022, Tahltan Central Government and Province of BC signed the Declaration Act Consent Decision-Making Agreement for Eskay Creek Project
 - Pertains to Eskay Creek Revitalization Project, proposed by Skeena in Tahltan territory
 - Subject to provincial EA and federal IA
 - Negotiated pursuant to:
 - BC's Environmental Assessment Act, which requires consent for certain projects and enables
 Minister to enter agreement with an Indigenous Nation with respect to a Provincial
 environmental assessment and
 - BC's Declaration on the Rights of Indigenous Peoples Act, ("DRIPA")
- Consent-based decision-making framework
- Example of BC's efforts to integrate free, prior and informed consent into EA process, in line with UNDRIP and DRIPA



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Takeaway 2 Indigenous-owned projects continue to proliferate



- Tilbury Liquefied Natural Gas Expansion Project FortisBC and Snuneymuxw First Nation Agreement:
 - January 2023 agreement regarding Snuneymuxw's rights related to the potential project impacts, and benefit sharing
- Athabasca Chipewyan First Nation Concord Solar Partnership
 - ACFN 50 percent ownership in three solar farms in southern Alberta, in Blood Tribe territory
 - Cumulatively 480 acres and 160 megawatts generation capacity
- Cedar LNG Approval and Agreement
 - Canada's first Indigenous majority-owned LNG facility to receive approval in March 2023
 - Floating liquefied natural gas export facility and marine terminal to be located on Haisla
 Nation-owned land in Kitimat, BC, proposed in partnership by Haisla Nation and Pembina
 Pipeline Corporation





Takeaway 3 Ontario Superior Court confirms no duty to consult in amending and revoking legislation



- Association of Iroquois and Allied Indians v Ontario (Minister of Environment, Conservation and Parks)
 - Majority found Crown did not have constitutional duty to consult regarding amendments to Ontario's Environmental Assessment Act and revocation of the Forestry Regulation
 - Found that even if duty existed, it was at the low end of spectrum and consultation that occurred was adequate
 - Minority decision by DL Corbett J: revocation of the Forestry Regulation was executive rather than legislative action, and the process by which the regulation was enacted was itself consultation and accommodation — therefore duty to consult applies, and was not met in this case





Takeaway 4 In BC case, injunctive relief is available for asserted but unproven Aboriginal title claim



- Reece v Canada (Attorney General), 2022 BCSC 865
 - Dispute about the transfer of Crown lands at the mouth of the Nass River in NW BC to the Nisga'a Nation
 - Plaintiffs, Lax Kw'alaams and the Metlakatla Nations, sought injunction preventing transfer of lands, because of asserted, but not yet proven, Aboriginal title to those lands
 - Court applied test for injunction and found that:
 - Plaintiffs' evidence of Aboriginal title is compelling, creates serious issue to be tried
 - Irreparable harm would result to Plaintiffs' ability to prove title, if the lands were transferred to and developed by Nisga'a
 - Balance of convenience favours plaintiffs, who provided sound evidence, over Nisga'a who
 did not support their asserted claims of economic harm with sufficient evidence



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Oil & Gas Key Takeaways



- 1. Developments in liability management frameworks in Alberta
- 2. Jurisdictional developments in Alberta





Takeaway 1 Developments in liability management frameworks in Alberta



- Alberta's Liability Management Incentive Program
 - Up to \$100 million in credits over 3 years for qualified companies that remediate sites that have been inactive for at least 20 years
 - Would be applied to all well sites in the province, including the orphan well inventory
 - Currently under development, with consultation planned in the future
- AER Directive 088: Licensee Life-Cycle Management
 - Regulated liability management system throughout the energy development lifecycle
 - Implementation seeks to mitigate the existing liability associated with inactive and orphaned wells in Alberta
 - Amendments include: the introduction of a Closure Nomination Program; providing an opportunity for eligible requesters to request the closure of a site; and a description of the closure plan approaches
- AER Directive 058: Oilfield Waste Management Requirements for the Upstream Petroleum Industry
 - Amendments focused on consolidation of multiple documents (IDs and ILs) and expanded to include storage of water for reuse
 - Directive now applies to geothermal resource development







Takeaway 2 Jurisdictional Developments in Alberta



- The Alberta Sovereignty Within a United Canada Act came into force in December of 2022
 - Enables Legislative Assembly to find that a federal initiative is unconstitutional, and Cabinet to make orders suspending the application of that initiative
- In May 2022, a majority of the Alberta Court of Appeal ruled that the Impact Assessment Act is ultra vires Parliament
 - Federal government appealed; Supreme Court of Canada heard appeal over two days in March 2023









Standard of Review Key Takeaways



- 1. On judicial review of regulations, reasonableness standard of review applies in federal courts (*Innovative Medicines Canada v Canada (Attorney General*)) and hyper-deferential standard applies in Alberta (*Auer v Auer, and TransAlta Generation Partnership v Alberta (Minister of Municipal Affairs*))
- 2. Appellate standards of review are applicable to questions of procedural fairness and to abuse of process in statutory appeals (*Law Society of Saskatchewan v Abrametz*)
- 3. Correctness standard applies when courts and administrative bodies have concurrent first instance jurisdiction over a legal issue in a statute (Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association)





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Conclusion – 5 Key Areas of Updates

Legal developments post-Federal and provincial Yahey, indicate a trend towards governments have regulatory cooperation in Cumulative taken aggressive acknowledgment of Indigenous **Effects** measures to reduce self-governance carbon emissions, Climate Change, especially in the Decarbonization. electricity sector and Power Continued progress Oil and Aboriginal in implementing Gas UNDRIP, and increase in largescale Indigenous-New category of owned projects Standard Updates in liability correctness standard of Review management frameworks and jurisdictional developments in Alberta





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