

Energy transition and the opportunity for Canada to be an ‘energy superpower’

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Authors: [Paula Olexiuk](#), [Vivek Warrier](#)

In conversation with: Paula Olexiuk and Vivek Warrier

The energy transition in Canada is a complex process involving the shift from traditional energy sources, such as coal, oil, and gas, to renewable and more sustainable sources like wind, solar, nuclear, and hydroelectric power. This transition is not only a technical and economic challenge but also a legal one. Lawyers practising in this field must navigate a rapidly evolving landscape of regulations, contracts, and disputes.

In this Q&A, Osler's Energy partners Paula Olexiuk and Vivek Warrier address some of the projects and issues their clients are facing as the traditional players and new entrants in the energy sector work through this period of transition:

1. How would you describe the current state of energy transition in Canada? Is Canada well positioned as a nation to remain competitive in this area and what kinds of projects are you helping Osler clients with right now?

Paula: Clients are looking at a variety of energy transition projects and contemplating how to obtain the funding needed for their projects. There is also a lot of government policy that we need to understand and be able to explain to our clients in terms of how they will be impacted. There's also new legislation, government grants and investment tax credits to understand. Being in Alberta, we have a strategic advantage having the historical experience with all our previous oil and gas developments. People are used to seeing new regulations and things changing over time, but I think this has been a real shift — they are really starting to take notice because of the increasing carbon tax. My phone is ringing a lot more about that and people are starting to look at it as being a real cost to their business. It's now incenting them to look for ways to decarbonize to save on compliance costs.

Vivek: I think the momentum is extraordinary and irreversible. Alberta and Canada are well on their way to becoming energy transition superpowers. I think we have a lot of natural advantages in that regard. There's been a role that government has played on both the federal and provincial level to incentivize these kinds of key investments in critical infrastructure and collaboration with Indigenous Peoples and all levels of government to

drive impressive and innovative investments in energy transition which are keeping us very busy.

2. How do the latest federal and provincial regulations and policies regarding renewable energy impact existing and planned projects?

Vivek: From a general perspective, I think the scale of investment that is going to be required to meet our commitments to achieve net zero by 2050 is massive. That is very unlikely to happen without considerable support and initiative from all levels of government. Our tax group has been at the vanguard of understanding how these work and how different incentives can be stacked to enable projects to be developed and operate in an economic and feasible way. I think the background to all this government investment is the fact that all over the world, but particularly in the United States, we've seen extraordinary levels of subsidies for renewable project development, for hydrogen project development, carbon sequestration developments — low carbon fuels of all kinds. And in fact, the *Inflation Reduction Act* in the United States goes so far as to essentially be offering free money to project proponents who are developing this kind of project. For Canada to continue its trajectory in terms of being at the forefront of the energy transition and development of energy transition related projects, there's no option but for our governments to respond.

3. How is Osler positioned to help clients with all the demands in this emerging area?

Paula: At Osler we take a team approach and cover all the aspects of project development in the energy transition space. We work closely with the regulatory group so that people can understand how to get their project approvals and how they can deal with a variety of issues that are coming up. There are also typically real estate matters that arise and tax structuring or advice around the investment tax credits.

Vivek: Rarely do we get engaged on a project in any one of these sub sectors within energy transition where we're just asked to do one piece of a project. I think part of the reason people come to Osler is that they recognize that we're tier one in every space that might intersect with the energy transition. That includes the commercial energy work that Paula and I do, the engineering, procurement and construction work that Paula does, along with project finance, corporate, regulatory, real estate and tax; basically, we're able to provide a full slate of services that cover 360 degrees of a client's legal needs when it comes to projects like this. On top of that, I think our team-based approach means there's no siloing or inhibiting us from engaging the best people to do the job for the client, no matter what office they sit in, across the country.

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Paula: It allows us to compare what different jurisdictions are doing as well. For instance, the B.C. Hydro RFP has unique Indigenous requirements. We can reach out to our Montréal office and look at the Québec RFP that's been launched there and speak to somebody in Toronto about what's happening in Ontario. We bring that kind of expertise right across the country.

Vivek: Particularly on the commercial energy side of things, I'm not aware of many other firms, if any, that truly have a national group like we do with Jake Sadikman, Elliot Smith, Danna Donald, Richard King and Rocco Sebastiano in Toronto. We're able to cover projects

across the country, because it's truly a group that's national in scope of expertise. One particular area where we are able to leverage our expertise in other jurisdictions is nuclear, where individuals in our Toronto office have leading expertise from decades of nuclear power generation in Ontario that can be leveraged for other provinces like New Brunswick, Saskatchewan and Alberta which are looking at small modular reactor (SMR) projects.

Paula: The technology piece is also huge in energy transition. We need to figure out better ways of doing the same things that we've always done in terms of producing electricity and generating fuels. How are we going to deal with carbon capture so we can continue to operate certain facilities that are emitting? Technology is key and it really dovetails with Osler's commercial practice and with the Emerging High Growth practice because they see some of the new technologies coming forward in the energy transition space. That works nicely in terms of when they get to later stages; we can help them deploy their technology and see how it can impact the industry when they come up with new methodologies of how to deal with carbon.

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Vivek: Paula and I are both working with a company that came to the firm as an EHG client that the firm helped with an early-stage financing, but as Paula mentioned, that client has evolved to the point where they're ready to pilot their technology. I assisted them with an agreement with a larger energy company that was willing to make an investment in return for the possibility of licensing the technology and Paula assisted on the engineering, procurement and construction side. It will be a game-changing technology that could reduce the carbon emissions of producing hydrogen from the natural gas stream by almost 70%. It also produces solid carbon that can be used in other applications. So not only is the carbon not escaping into the atmosphere, but it can be transformed into a valuable resource.

I think it's simply become table stakes for any energy infrastructure project to partner on an equity basis with First Nations and Indigenous communities that are affected by the project, and maybe even further afield.

Paula: And it is transported without a pipeline. It will be game changing.

4. Are the companies that you are assisting primarily new companies to this industry or legacy companies that are trying to transition?

Paula: It's really a mix of different companies. With energy transition we're getting some new companies coming into Alberta and across Canada that are looking for places to invest their capital. But we also have all the big energy and utility companies that must pivot to meet the changing standards that governments are implementing that impact their businesses.

Vivek: The mix of companies can be different depending on what which subset of the broad umbrella term of energy transition that we're talking about — so for example with carbon sequestration I would suggest it is existing hydrocarbon companies, whether it's upstream and midstream, that have the expertise to develop projects like this and operate them effectively and sustainably. We're seeing massive investments from the consortium of oil sands producers that we call the Pathways Alliance and we're lucky to be acting for a couple of the proponents of that group. There is also the Alberta Carbon Grid, which is a joint venture between TC Energy and Pembina Pipeline, which amounts to billions of dollars of

investment in developing a network of pipelines to gather carbon emissions and sequester them in a hub in northern Alberta.

5. How do land rights and Indigenous claims affect the development of energy projects, particularly in remote or environmentally sensitive areas?

Vivek: I think it's simply become table stakes for any energy infrastructure project to partner on an equity basis with First Nations and Indigenous communities that are affected by the project, and maybe even further afield. What that does is produce broad alignment between the energy industry and an energy transition project proponent and those First Nations and Indigenous communities and provides them with the potential for a long-term revenue stream, which obviously is beneficial to the community but also allows them to refinance and invest further in and build capacity in terms of how to participate in these types of projects. We've moved almost exclusively from an impact-benefits model to First Nations being offered some percentage of an equity interest in a project and being able to have direct meaningful influence on how the project is managed, particularly as it relates to matters of environmental and cultural sustainability. At the same time, the benefit for the project proponent is that you have certainty, you have a good partner, and it's much less adversarial than it was in the past.

Paula: I have a lot of clients that speak about the importance of reconciliation and that they are really looking to partner, as part of their support to move towards reconciliation, with Indigenous groups. Many of the companies are really more interested in these long-term partnerships as part of their overall approach to that relationship. The renewable electricity area is very interesting. Saskatchewan just did their renewable RFP and it has an Indigenous ownership component of 25%. Historically, if you go back a few years when Alberta did its RFP in 2017 to 2019, they did seven rounds and there was only one that required Indigenous participation. The B.C. RFP has come out with similar rules to Saskatchewan.

Vivek: A few years ago Alberta came out with the [Alberta Indigenous Opportunities Corporation](#) that provides loan guarantees to First Nations who want to invest in projects like this and that has resulted in significant growth in the ability of First Nations and Indigenous communities to invest in and take equity interest in energy transition projects. Now, B.C. and Saskatchewan have developed similar programs on a smaller scale, and we just saw in the federal budget an Indigenous loan program with the same intent.

6. How are joint ventures and partnerships typically structured to develop, operate, and manage energy transition projects?

Paula: We're seeing a lot of joint ventures again and one example I'm thinking of is in carbon sequestration. As much as they have experience with pipelines, a lot of them don't know how sequestration might work. While we've had an operating project here for a while, that expertise sits with Shell, it doesn't sit with all the operators. There is a joint venture between Pembina and TC Energy — they want to work on that problem together. They can bring together even better solutions when they partner in that way. And then they can bring the capital that is needed for some of these projects. A lot of these companies are trying to work together to share ideas, share solutions, share their knowledge and then also share the cost burden of the projects.

Vivek: The commercial and financial risk for some of these projects given the scale that's being proposed is profound. And as a result, it's not unusual for companies to want to ally

with one another and allocate that risk between them. And at the end of the day, in those larger scale projects, like carbon capture projects, and but also in hydrogen related developments, it makes sense.

Paula: Some of the joint ventures we're seeing and some of the M&A activity is in some of the bigger players buying up technology and companies that they can bring in-house and then look at how they can monetize that technology within the current tools that they have. There is also some M&A on the technology side and joint venturing on the technology side as well. We're also seeing joint venture arrangements when the technology provider shares their technology, and the other party is providing the funding.

7. What are the common causes of disputes in energy transition projects, and how are they typically resolved?

Paula: We often see that negotiations are a first step in the dispute resolution process. Parties try to negotiate a resolution around different issues in a joint venture or in a construction contract or with their customers to avoid going into proceedings, with proceedings viewed as a last resort where the parties can't negotiate their way through a particular dispute.

We help companies identify what those issues are and then try to find a negotiated solution as opposed to going to court or to arbitration, which is very costly. Negotiated solutions are what I advocate for my clients. For dispute resolution clauses we really push for them to have that negotiation piece as a first step so the parties can get together and it often requires them to bring their more senior managers or senior officers /directors to the table.

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8. How is Osler uniquely positioned to help clients with energy transition and the emerging area of law around it?

Paula: We've been active in this marketplace for a couple of decades, working on all of the complex energy projects and so we're used to dealing with big scale complex issues, and we're very solution oriented. At Osler that means working across teams with all the other players in the different areas of expertise that you would need to answer questions that arise. These projects tend to have a ripple effect where they require that we bring expertise from a variety of different practice areas to find the best solution and advice for the client.

Vivek: The firm has been strategically prescient in seeing and understanding where the world was going with energy transition and been willing to embrace that as a core part of our strategy. Osler has always been out in front when it comes to developing the expertise to assist the unique aspects of these types of projects.

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Do you have questions about energy transition? We encourage you to reach out to a member of the Energy team.

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