

**International  
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Legal Guides**



# Renewable Energy

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**The Rise of Co-Located Renewable Projects**

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## 1 Overview of the Renewable Energy Sector

**1.1 What is the basis of renewable energy policy and regulation in your jurisdiction and is there a statutory definition of 'renewable energy', 'clean energy' or equivalent terminology?**

Renewable energy law and policy varies across Canada. The federal government has authority over certain aspects of renewable energy law and policy, particularly with respect to undertakings that occur on federally regulated lands or that involve interprovincial or international transmission of energy. Canada's provinces and territories have jurisdiction over most other aspects of renewable energy.

As renewable energy law is primarily governed at the provincial level, there is no universal definition across Canada for "renewable energy" or "clean energy". However, renewable energy is commonly understood to include energy produced from hydro, wind, solar, geothermal, biomass, biogas, green hydrogen, and ocean or tidal. British Columbia, for example, specifies these types of energy sources. Other provinces, such as Alberta and Ontario, have defined renewable energy more generally as an energy source that occurs naturally or that can be replenished naturally, and include particularly identified sources of renewable energy such as those listed above.

Renewable energy is an increasing priority for energy consumers, both within and outside Canada. Energy consumers are pushing their utility providers to add more renewables to their resource portfolios, and to the extent that utilities are not responding quickly enough, consumers are prepared to bypass their utilities by directly acquiring renewable energy. Rooftop solar is just one example.

**1.2 Describe the main participants in the renewable energy sector and the roles which they each perform.**

Currently, renewable energy sources are predominantly used to generate electricity, though markets are developing for renewable natural gas, waste heat recovery and biofuels.

With respect to provision of electricity generated from renewable energy sources, the markets in most provinces are vertically integrated and the key participants are:

- Crown corporations, which operate as bundled service utility providers and are owned by provincial governments. In British Columbia, Manitoba, New Brunswick, Newfoundland, Quebec and Saskatchewan, Crown corporations are the principal participants in the provision of utility services.
- Independent power producers who build and operate renewable energy projects and supply power to electric utilities.
- Provincial regulatory bodies, economic, environmental, safety and otherwise, which regulate the production, supply, transmission and distribution of energy.
- Provincial governments, which enact legislation and set public policy applicable to the renewable energy sector. In jurisdictions where Crown corporations dominate the electricity markets, the governments use their ownership interests in Crown corporations to advance provincial energy objectives.
- Federal government, which regulates the interprovincial transmission of electricity through the Canada Energy Regulator and establishes environmental assessment laws and policies for renewable project approval that touches on federal powers under Canada's constitutional law.

In Ontario, there is a mix of Crown corporations, municipal utilities and private corporations, whereas Alberta is entirely privatised, with the exception of the Alberta Electric System Operator.

With respect to emerging, smaller-scale renewable energy projects, local governments such as municipalities and regional districts play a significant direct role alongside the private sector; examples include the production of renewable natural gas from municipal landfills or the capture and use of waste heat from municipal sewer systems. Provincial governments and the federal government are indirectly involved in supporting these smaller-scale projects, generally by enacting favourable tax regimes and providing grant funding for municipal and private sector projects.

Please also see question 2.3.

### 1.3 Describe the government's role in the ownership and development of renewable energy and any policy commitments towards renewable energy, including applicable renewable energy targets.

The government's role in ownership and development of renewable energy projects is addressed in question 1.2.

With respect to targets, the *Canadian Net-Zero Emissions Accountability Act* requires the federal government to achieve net-zero greenhouse gas (GHG) emissions by 2050. Canada has also committed to requiring all generation of electricity to be net-zero by 2035 through the Enactment of a Clean Energy Standard under the *Canadian Environmental Protection Act*, expanding renewable energy development, and connecting regions to clean power. The 2023 federal budget committed \$70 million to support major investments in clean electricity and clean growth, introducing substantial new investment tax credits to incentivise investment into clean growth.

At the provincial level, government support for renewable energy has varied, with some provinces, such as British Columbia, taking an early leadership role, while other provinces have been slower to act. Each province develops its own plan and pathways including renewable energy targets.

The level of support also varies at the local government level. Several cities, including the City of Vancouver, have declared a climate emergency and enacted by-laws requiring all new building developments in the city to use renewable energy for heating. Vancouver has also announced that it is planning to move forward with renewable energy requirements for existing buildings in the city.

## 2 Renewable Energy Market

### 2.1 Describe the market for renewable energy in your jurisdiction. What are the main types of renewable energy deployed and what are the trends in terms of technology preference and size of facility?

The predominant renewable energy deployed in Canada is hydroelectricity. Hydroelectricity makes up 60% of all electricity production in Canada. Some provinces are more appropriately suited for certain kinds of renewable energy, depending on the geography, climate and existing infrastructure of each province. For example, significant portions of the energy market in provinces such as British Columbia, Manitoba and Quebec come from hydroelectric projects. Other provinces, such as Alberta, Nova Scotia and Ontario, are more attractive for wind power projects and there is a developing solar power market in Alberta, Ontario and Saskatchewan. One industry expected to grow across Canada generally is hydrogen.

### 2.2 What role does the energy transition have in the level of commitment to, and investment in, renewables? What are the main drivers for change?

Federal laws set a minimum national standard for carbon pollution pricing across all provinces and territories, creating the incentive for change to renewables. Shareholder and investor attitudes are also a significant driver for change, and the increasing incidence of significant climate change events in Canada – including extreme temperatures, wildfires and flooding – have also put a focus on the pace of energy transition.

Each province has different opportunities for investment in renewable energy projects, depending on the existing energy resource mix in the province, and therefore different strategies to

achieve substantial reduction in GHG emissions. In Alberta and Saskatchewan, the energy transition has led to a focus on replacing coal and natural gas with renewables for electricity generation; whereas, in British Columbia the focus is on promoting electric vehicles to reduce gasoline and diesel consumption and transitioning to renewables for heating buildings.

Please also see question 2.3.

### 2.3 What role, if any, has civil society played in the promotion of renewable energy?

Over the last 10 years, climate change, energy policy and environmental regulation have been key election issues for the federal government and for many provincial governments. Many provinces provide opportunities for the public to engage with the project approval processes for energy projects and include sustainability and climate change as factors to be considered in project approval.

Across the country, there is an increasing demand from the public for electricity generated from renewable energy to displace traditional use of fossil fuels. Examples include electric vehicles to displace the internal combustion engine, and electric heat pumps to displace natural gas boilers.

### 2.4 What is the legal and regulatory framework for the generation, transmission and distribution of renewable energy?

Typically, provincial regulators issue approvals for facilities or expansions and control the terms and conditions of service between a regulated utility and end-users through long-term resource plan filings, rate cases and tariff filings. In provinces with competitive market sectors, independent bodies monitor rates and provision of services.

Depending on the size and type of the renewable energy project, an environmental assessment may be required for new, modified or expanded facilities, and all facilities will require a variety of permits, licences and authorisations addressing environmental, land use, safety and other regulated aspects of the project. Regulators must assess whether consultation and accommodation in respect of project impacts on the Aboriginal and treaty rights of Indigenous groups have been adequate, as these rights are protected under Canada's Constitution.

### 2.5 What are the main challenges that limit investment in, and development of, renewable energy projects?

The main challenge for new renewable energy projects in Canada has been the lower demand for additional sources of energy, in part because there is a strong focus in Canada on energy efficiency to reduce the demand for energy. An additional factor is reluctance by some provincial governments to phase out existing fossil fuel projects, which would create more opportunities for renewable energy projects but could strand historical investments.

The cost of building new renewable energy projects relative to the demand for new energy (Canada is a net exporter of electricity) has been an obstacle because new renewable projects will tend to displace existing projects, potentially increasing the cost to the consumer for renewable energy.

An additional factor is regulatory uncertainty, which can create delay and increased cost, presenting a challenge to investment in renewable energy projects. Regulatory uncertainty is attributable both to evolving legislation and policy governing

renewable energy, and in the difficulty in applying laws and policies that were drafted before many emerging technologies in this sector were developed. There are also unique land use issues that accompany renewable project development, including the depth of engagement required to ensure adequate consultation and accommodation of the interests of Indigenous groups and project stakeholders.

#### 2.6 How are large utility-scale renewable power projects typically tendered?

The tendering process for large utility-scale renewable power projects differs from province to province. In provinces with a government-owned corporation holding significant control over the supply, transmission and distribution of electricity, those corporations will typically administer competitive procurement processes to award power purchase agreements or public-private partnerships to independent power producers. Direct contracting between large industrial-scale energy consumers and utility scale renewable power projects is an emerging trend.

#### 2.7 To what extent is your jurisdiction's energy demand met through domestic renewable power generation?

Renewable energy resources contribute approximately 19% of Canada's total primary energy supply and approximately 66% of electricity generated in Canada is sourced from renewable energy. Clean fuels such as hydrogen, renewable natural gas, biofuels and synthetic fuels currently make up a small percentage of Canada's total energy supply. The most significant increase is expected in electricity from renewable energy, with renewable, synthetic, and hydrogen fuels expected to be used to serve those needs for energy that are particularly challenging to electrify.

### 3 Sale of Renewable Energy and Financial Incentives

#### 3.1 What is the legal and regulatory framework for the sale of utility-scale renewable power?

Please see question 2.4.

#### 3.2 Are there financial or regulatory incentives available to promote investment in/sale of utility-scale renewable power?

In jurisdictions where Crown corporations dominate the electricity markets, governments use their ownership interests in Crown corporations to advance provincial energy objectives, including setting minimum requirements of renewable energy generation leading to competitive procurement programmes if there is demand for additional energy resources. Government grants and tax incentives also promote investment in large renewable power projects. Please also see the answer to question 1.3.

#### 3.3 What are the main sources of financing for the development of utility-scale renewable power projects?

Many utility-scale renewable power projects are owned and funded by the government. Independent power producers fund the development of projects through private investment, financing (including project financing), debt, government grants and tax credits.

#### 3.4 What is the legal and regulatory framework applicable to distributed/C&I renewable energy?

In some provinces, the regulatory framework for distributed energy resources (DERs) is undergoing review and amendment, as current regulations were designed for the historic model of centralised energy delivery. Some provinces have developed regulatory frameworks to integrate DERs. For example, in British Columbia, a net metering programme is in place that permits excess energy from certain small-scale renewable energy sources to be sold to the provincial Crown corporation. Several provinces are also reviewing the viability of creating a regulatory framework for rooftop solar power, although the economic viability of solar power tends to vary from province to province.

For C&I renewable energy, depending on the source of energy and specifics of the project, regulatory approvals addressing environmental, land use, and safety issues may be required, or existing authorisations may require amendment.

#### 3.5 Are there financial or regulatory incentives available to promote investment in distributed/C&I renewable energy facilities?

Generally, there is a higher level of private investment in C&I facilities compared to DERs; however, there are federal and provincial programmes to incentivise distributed renewable energy. As outlined in question 1.3, the 2023 federal budget has committed significant funding to technology innovation that will be of interest to developers of C&I renewable energy facilities. There are also provincial funding programmes that provide opportunities for C&I projects. For example, the 2022 CleanBC Industry Fund invested almost \$45 million in 17 emission-reduction projects, including projects involving fuel switching from oil and gas to renewable energy sources and waste heat recovery projects.

#### 3.6 What are the main sources of financing for the development of distributed/C&I renewable energy facilities?

Balance sheet financing, government funding and tax incentives, as well as private investment, are the main sources of financing. An example of a government funding initiative is the Canada Infrastructure Bank, which offers widespread funding support for renewable energy projects, including projects that partner with and work to implement clean energy solutions for Indigenous communities.

#### 3.7 What is the legal and regulatory framework applicable to the development of green hydrogen projects?

There is no comprehensive regulatory framework for the development of green hydrogen projects in Canada. Regulatory frameworks for hydrogen, where developed or developing, are not consistent, and gaps in the existing frameworks that apply to other energy projects will need to be addressed to provide the regulatory certainty needed to enable investment in and adoption of hydrogen. There are some regulations at the federal and provincial level that encourage the use of hydrogen technologies, including low-carbon fuel regulations, carbon pricing, vehicle emissions regulations, zero-emission vehicle mandates, and renewable gas mandates in natural gas networks. The federal



government, as well as the provincial governments of British Columbia, Alberta and Ontario, have released hydrogen strategies that outline each government's vision. British Columbia recently established the BC Energy Regulator and is developing a regulatory framework for hydrogen to support the clean energy transition.

### 3.8 Are there financial or regulatory incentives available to promote investment in green hydrogen projects?

Federal and provincial hydrogen strategies include the promotion of industry and government investment in hydrogen projects, primarily by de-risking investments through funding programmes and long-term policies. In the 2022 Fall Economic Statement, the federal government announced a new refundable investment tax credit for investments in clean hydrogen production, with the added incentive that more support is available for projects that produce cleaner hydrogen. In the federal budget tabled in March 2023, the government announced the availability of contracts for difference, which encourage investment into clean projects by backstopping the future price of carbon or hydrogen, and mitigating the economic risk for the development of major emission reduction projects. The federal government has also entered into relationships with foreign governments to promote cooperation in the field of hydrogen energy, including Germany and the Netherlands.

The federal government and several provinces have promulgated clean fuel or low-carbon fuel regulations and zero-emission vehicle requirements intended to incentivise the development and adoption of clean fuels, including hydrogen. Canada and certain provinces have also created credit markets associated with these regulations, which could provide a new funding mechanism for the commercialisation of new fuel-production methods or the development of clean energy technology (including hydrogen). Legislation recently passed in British Columbia will require some utilities to use a portion of their revenues from the sale of low-carbon fuel credits for programmes dedicated to increased use of low-carbon products.

### 3.9 What are the main sources of financing for the development of green hydrogen projects in your jurisdiction?

Please see question 3.6.

### 3.10 What is the legal and regulatory framework that applies for clean energy certificates/environmental attributes from renewable energy projects?

There are two different schemes for trading in the environmental attributes associated with renewable energy generation: one based on private contracts; and one that is a fully regulated, government-run credit and debit generation and trading scheme. In the former, private parties are free to contract in relation to renewable energy and emission reduction attributes, which may include certain types of renewable energy certificates issued under a range of programmes. In the latter, the government has established schemes, such as low carbon fuels, where the government prescribes standards, credits, debits, issues credits, and administers the trading and clearing scheme.

Trade in environmental attributes is not formally regulated in Canada. On a global basis, it has been incorporated into the machinery of Canadian electricity markets by recognition from the federal government, corporations, and statutory regimes.

### 3.11 Are there financial or regulatory incentives or mechanisms in place to promote the purchase of renewable energy by the private sector?

Most regulatory mechanisms provide incentives to producers and suppliers of energy in favour of renewable energy and disincentives to consuming fossil fuels. British Columbia has discounted electricity rates for large customers that switch from fossil fuels to electricity. Please also see question 1.3.

### 3.12 Is there a mandatory (or a developed voluntary) carbon emissions trading market in your jurisdiction?

In 2019, the federal government enacted the *Greenhouse Gas Pollution Pricing Act*, which sets a national minimum standard for carbon pollution pricing that all provinces must meet. While this national minimum standard acts as a floor, each province is able to set its own pricing system to suit its regional social and economic needs, provided that it meets the floor set by the federal standard. For example, British Columbia has enacted the *Greenhouse Gas Reduction (Renewable & Low Carbon Fuel Requirements) Act*, which facilitates a carbon market that rewards low-carbon alternatives based on their emission reductions.

Moreover, in 2022, the federal government released new Clean Fuel Regulations, under which primary suppliers are required to reduce their carbon intensity by an increasing amount each year using compliance credits. The federal government has also announced a Greenhouse Gas Offset Credit System as part of its 2030 Emissions Reduction Plan. Stakeholders such as municipalities, foresters and Indigenous communities may register projects that follow a federal offset protocol, which will then generate a tradeable offset credit for every tonne of emissions the project reduces. Credits can then be sold to other stakeholders to be used toward meeting their obligations under their province's (or the federal) carbon pollution pricing system.

### 3.13 What is the legal and regulatory framework applicable to the development of carbon capture and storage projects?

In Canada, the provinces own the pore space below the surface of the land that is required for storage, meaning that they have legal authority over carbon capture and storage projects. Provincial energy regulators are also responsible for regulating injection into the pore space. Each province has taken a different approach to providing rights to emitters. For example, Alberta operates on a "hub" model, where emitters can submit proposals for access to carbon storage hubs, resulting in multiple emitters injecting into the same hub. British Columbia has taken a different approach, which requires emitters to obtain a lease or licence to store carbon. If a proponent wishes to inject offsite, it is required to obtain an approval for a pipeline to transport the carbon to the project site. Pipelines that do not cross provincial boundaries are regulated by the relevant province's energy regulator.

### 3.14 Are there financial or regulatory incentives available to promote investment in carbon capture and storage projects?

The most promising reservoirs in Canada for underground carbon sequestration are already being used for natural gas storage and would need to be converted.

**3.15** What are the main sources of financing for the development of carbon capture and storage projects in your jurisdiction?

Please see question 3.6.

## 4 Consents and Permits

**4.1** What are the primary consents and permits required to construct, commission and operate utility-scale renewable energy facilities? Does the consenting and permitting regime differ for specific types of renewable energy facilities, such as nuclear, offshore wind, battery storage, or others?

Please see question 2.4. Consenting and permitting regimes differ at the provincial and federal levels. Large hydroelectric dams and some offshore wind projects are subject to the federal Impact Assessment Act process, and must complete several assessment processes in order to obtain approval. Nuclear energy is another type of federally-regulated renewable energy, and nuclear facilities are subject to the federal *Nuclear Safety and Control Act*; licences are issued by the Canadian Nuclear Safety Commission in accordance with the Act. At the provincial level, some types of renewable energy may also be subject to unique consenting and permitting regimes, including joint and coordinated provincial and federal assessment processes. For example, in several Atlantic provinces, regulatory authority for offshore wind is jointly managed by the Canada-Nova Scotia Energy Regulator and the Canada-Newfoundland and Labrador Offshore Energy Regulator.

**4.2** What are the primary consents and permits required to construct, commission and operate distributed/C&I renewable energy facilities?

Please see question 3.4.

**4.3** What are the requirements for renewable energy facilities to be connected to and access the transmission network(s)?

Most of the provincial electricity grids in Canada have North American industry-standard interconnection requirements focused on meeting standards for safe and reliable interconnected operations and open access transmission tariffs. However, connection to the electricity grid does not necessarily entitle project owners to sell energy to a buyer. As the majority of provinces have bundled utility providers, connection of energy generation facilities to the electricity grid is typically for the purpose of selling the facility's energy to the utility provider pursuant to a long-term contract. In addition, some provincial market structures (such as Ontario and Alberta) have power pools where connected generating facilities bid their energy into a pool market structure competing with other market participants.

**4.4** What are the requirements for renewable energy facilities to be connected to and access the distribution network(s)?

Please see question 4.3.

**4.5** Are microgrids able to operate? If so, what is the legislative basis and are there any financial or regulatory incentives available to promote investment in microgrids?

In Canada, microgrids are used primarily in remote areas where a transmission connection to the grid would be prohibitively expensive and unreliable. Microgrids are governed primarily through provincial legislation, with certain regulatory laws applying if a microgrid is considered a "utility", and requirements shifting depending on the size of the microgrid. Microgrids must also comply with all general environmental and health and safety laws. The federal Smart Grid Program includes funding for microgrids using renewable energy.

**4.6** Are there health, safety and environment laws/regulations which should be considered in relation to specific types of renewable energy or which may limit the deployment of specific types of renewable energy?

Generally, there are no significant health, safety and environment laws specific to renewable energy; renewable energy projects are governed by the laws of general application for health, safety and the environment in the relevant jurisdiction(s). Green hydrogen may be an exception, as it is a significantly different substance than anything delivered by pipelines now and may need to be uniquely regulated for safety.

## 5 Storage

**5.1** What is the legal and regulatory framework which applies to energy storage and specifically the storage of renewable energy?

The legal framework surrounding the storage of renewable energy in Canada varies by province, with many jurisdictions in the process of developing a framework specific to energy storage. For example, the Alberta Electric System Operator has an Energy Storage Roadmap outlining its plans to facilitate integration of energy storage into its regulatory framework and its grid and market systems.

Ontario has been a leading jurisdiction in Canada and has regulatory requirements specific to energy storage, including the requirement to obtain an electricity storage licence subject to some exemptions. Energy storage licensees in Ontario must comply with laws of general application, including Market Rules. The Market Rules for the Ontario electricity market are made by the Independent Electricity System Operator and their purpose is to establish a competitive, reliable and efficient market for the sale and purchase of electricity and ancillary services in Ontario.

In British Columbia, the Crown corporation BC Hydro is planning to install utility-scale battery storage systems as part of the ongoing buildout of the province's integrated electric system. These will be subject to laws of general application.

**5.2** Are there any financial or regulatory incentives available to promote the storage of renewable energy?

There are a number of financial incentives available from both federal and provincial programmes to promote the storage of renewable energy.

Federal incentives include the Smart Renewables and Electrification Pathways Program, which provides \$922 million over four years for smart renewable energy and electrical grid modernisation projects, including energy storage projects. Additionally, the federal Smart Grid Program aims to provide financial support up to \$5 million for modernising electricity grids and storage facilities to make it easier to integrate renewable energy sources. Additionally, the Canada Infrastructure Bank announced that it would invest up to \$170 million in the Oneida Energy Storage project in Ontario, which is expected to be the largest battery storage project in Canada.

### 5.3 What are the main sources of financing for the development of energy storage projects in your jurisdiction?

Please see question 3.6.

## 6 Foreign Investment and International Obligations

### 6.1 Are there any special requirements or limitations on foreign investors investing in renewable energy projects?

There are no foreign ownership restrictions specific to renewable energy projects in Canada. However, foreign investors acquiring control of a Canadian business or starting a new business in Canada are subject to the *Investment Canada Act*. Investments that exceed certain value thresholds or that engage Canada's national security are subject to approval of the Minister of Innovation, Science and Economic Development (ISED); all other investments, unless of a prescribed cultural business, require only notification. For 2023, direct investments made by nationals of: (i) certain specified free trade countries, will be reviewed if the enterprise value exceeds \$1.931 billion; and (ii) World Trade Organization (WTO) member countries will be reviewed if the enterprise value exceeds \$1.287 billion, or \$512 million in book value for state-owned enterprises. The threshold for review of non-WTO investments is \$5 million in book value for direct investment and \$50 million for indirect investment. The federal government retains the discretion to review all foreign investments that may engage national security. In evaluating a foreign investment proposal that is subject to review, the Minister considers the net benefit of the investment and assesses the risks it poses to national security.

Foreign investors falling below the financial thresholds, and where the proposed investment does not engage national security, are subject to the same regulations as domestic investors. Some provincial energy regulatory regimes require approval from the provincial regulator before the controlling interest of an energy utility can be transferred, and, on occasion, the nationality of the proposed owner may be considered by the regulator.

### 6.2 Are there any currency exchange restrictions or restrictions on the transfer of funds derived from investment in renewable energy projects?

Funds can be repatriated from Canada to other countries through the payment of dividends, the return of capital, the redemption of shares, the repayment or making of loans, and payments for the provision of goods or services. General banking laws and the federal *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* will apply to the transfer of funds.

Payments of dividends and interest to foreign investors can bring Canadian tax implications, subject to tax treaties with a foreign resident's home jurisdiction and other factors. Similarly, structuring energy projects as joint ventures or a partnership between Canadian and foreign entities can also have Canadian tax implications, subject to tax treaties with the foreign entities' home jurisdiction(s) and other factors.

### 6.3 Are there any employment limitations or requirements which may impact on foreign investment in renewable energy projects?

As a condition of approving a foreign investment, ISED may require undertakings that relate to employment, including the appointment of Canadians as independent directors on the board of directors or the employment of Canadians in senior management positions.

Companies seeking to employ foreign nationals may need to apply for a Labour Market Impact Assessment (LMIA) to demonstrate a need for the foreign national and that their employment will not negatively impact the Canadian labour market. Once the application is approved, the worker may apply for a work permit. Alternatively, the foreign national may be eligible for an LMIA exemption and apply for a work permit directly.

Business people can come to Canada for temporary business or investment purposes without a work permit if they qualify under the Canada-United States-Mexico Agreement (CUSMA), the General Agreement on Trade in Services, or another international agreement. If eligible business visitors intend to stay longer than six months, they may require a work permit.

### 6.4 Are there any limitations or requirements related to equipment and materials which may impact on foreign investment in renewable energy projects?

Materials for Canadian infrastructure projects are commonly procured using requests for proposals. In the private sector, a competitive bidding process is not a regulatory requirement but, if used, would be expected to trigger certain obligations to the bidding parties under Canadian common law.

The import of materials and equipment required for renewable energy projects may be subject to domestic controls, anti-dumping undertakings, permits, or other restrictions. The Canada Border Services Agency requires certain goods to be clearly marked with their country of origin. Anyone dealing with products listed as controlled goods must register with the federal Controlled Goods Program. Additionally, goods considered dangerous, such as new chemical and polymer substances, ozone-depleting substances and nuclear equipment, are subject to additional regulations. The *Special Import Measures Act* sets out subsidised goods from certain countries that are subject to additional duties and fees on import to prevent dumping. Steel imports are subject to special tariffs and regulations.

## 7 Competition and Antitrust

### 7.1 Which governmental authority or regulator is responsible for the regulation of competition and antitrust in the renewable energy sector?

The Competition Bureau Canada (Bureau) is the federal agency that administers and enforces Canada's competition laws across all sectors of the economy, including renewable energy. The



Bureau cooperates with provincial energy regulators, such as the Ontario Energy Board, which monitor competition and pricing for energy companies.

### 7.2 What power or authority does the relevant governmental authority or regulator have to prohibit or take action in relation to anti-competitive practices?

The Bureau is empowered to investigate and regulate anti-competitive practices such as abuse of dominant position, price fixing, bid rigging and false and misleading representations amongst other matters.

Companies who plan to undergo a merger are required to give notice of the proposed transaction to the Bureau if the target's assets in Canada or revenues from sales in or from Canada generated from those assets exceed a certain threshold, and if the combined Canadian assets or revenues of the parties or their respective affiliates in, from or into Canada exceed a certain threshold. For 2023, those thresholds are \$93 million and \$400 million, respectively. The "target size" threshold is adjusted annually based on GDP. The proposed transaction cannot be completed until 30 days after notice has been provided, or 30 days after any additional information requested by the Bureau within this period has been delivered. If a proposed merger is challenged, the Competition Tribunal may order that all or part of a merger is not to proceed, or impose restrictions on actions that can be undertaken by the merged entity.

In the renewable energy sector, it is common for energy projects to be structured as joint ventures. If the joint venture is not incorporated, the entities involved may not be required to provide notice of a merger to the Bureau. However, the transaction can still be subject to review under the merger provisions and as a potentially anti-competitive agreement.

### 7.3 What are the key criteria applied by the relevant governmental authority or regulator to determine whether a practice is anti-competitive?

The purpose of the *Competition Act* is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, to expand opportunities for Canadian participation in world markets while recognising the role of foreign competition in Canada, to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and to provide consumers with competitive prices and product choices. The *Competition Act* identifies certain anti-competitive practices as offences; most notably, conspiring with competitors by price fixing, restricting output or allocating markets. It also provides that certain anti-competitive activities may be addressed by order of the Competition Tribunal, including cessation of certain activities or practices if such practices or activities prevent or lessen or are likely to prevent or lessen competition in any relevant market.

With respect to mergers, the Bureau will oppose a merger if it determines that it is likely to prevent or lessen competition substantially. In assessing whether a merger or agreement substantially reduces competition, the Bureau considers factors such as whether foreign competitors will provide effective competition, whether a party to the arrangement has failed or is likely to fail, the extent to which substitutes for products supplied by the parties are available, the barriers to entry in the market, international and interprovincial trade barriers (such as tariffs), the level of regulatory control over the entity, whether effective competition would remain in the market, the likelihood

that the arrangement will remove an effective competitor, and the nature of change and innovation in the market.

The provinces with competitive power pool market structures have rules that participants must follow to ensure the fair and competitive operation of the market. Agencies monitor participant activity in these markets, and participants that do not follow the rules may be prosecuted. Substantial fines have been imposed.

## 8 Dispute Resolution

### 8.1 Provide a short summary of the dispute resolution framework (statutory or contractual) that typically applies in the renewable energy sector, including procedures applying in the context of disputes between any applicable government authority/regulator and the private sector.

Dispute resolution mechanisms depend on the market structure in each province. In provinces with vertically integrated utility providers, provincial energy regulators govern certain disputes between utility providers and their customers; however, the courts govern contractual disputes between renewable energy suppliers and the utilities. For example, the British Columbia Utilities Commission, the Alberta Utilities Commission and the Ontario Energy Board have exclusive jurisdiction over the settling of energy rates and terms of service, but not contractual disputes, which are generally within the jurisdiction of the courts.

In addition to its jurisdiction to determine disputes within its mandate, the Canada Energy Regulator is also required to provide alternative dispute resolution processes for the resolution of a dispute directly related to a matter regulated by the *Competition Act*, provided that all parties to the dispute consent.

Many renewable energy contracts, including those between renewable energy suppliers and utilities, include a term that the preferred form of dispute resolution is arbitration. Arbitration is often preferred as it allows parties to select arbitrators that may have specialised knowledge, proceedings are generally confidential, arbitration may conclude more quickly than litigation in court, and it allows parties more flexibility of time and place of proceedings.

### 8.2 Are alternative dispute resolution or tiered dispute resolution clauses common in the renewable energy sector?

Alternative dispute resolution clauses, in particular arbitration clauses, are common in renewable energy contracts. Tiered dispute resolution clauses are also common and often require negotiation between the parties before referring a dispute to mediation or arbitration.

### 8.3 What interim or emergency relief can the courts grant?

Canadian courts have jurisdiction to grant pre-trial injunctions, which include interim and interlocutory injunctions, if there is a serious issue to be tried, irreparable harm if the injunction is not granted, and if the balance of convenience favours injunctive relief. Interim injunctions protect rights on a short-term basis until an interlocutory injunction can be heard, while interlocutory injunctions are sought to protect rights until the final disposition of the proceeding.

**8.4 Is your jurisdiction a party to and has it ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and/or the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and/or any significant regional treaty for the recognition and enforcement of judgments and/or arbitral awards?**

Canada has acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. However, the application of the New York Convention is limited to only those differences arising out of commercial legal relationships. Each of the provinces has enacted legislation mirroring this approach, except in Quebec where the law has not provided for such a limitation.

Canada is a signatory to and has ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

**8.5 Are there any specific difficulties (whether as a matter of law or practice) in litigating, or seeking to enforce judgments or awards, against government authorities or the state?**

CUSMA, the trade deal replacing the North American Free Trade Agreement (NAFTA), eliminated the mechanism to commence investor-state arbitration proceedings, thus American and Mexican investors in renewable energy in Canada are unlikely to have access to a dispute mechanism against Canada. Enforcing judgments or awards against government authorities does not present any specific difficulties in Canada.

**8.6 Are there examples where foreign investors in the renewable energy sector have successfully obtained domestic judgments or arbitral awards seated in your jurisdiction against government authorities or the state?**

AbitibiBowater Inc., an American company, filed a claim against Canada under NAFTA, claiming that Canada, amongst other things, expropriated its hydroelectric facilities. AbitibiBowater Inc. sought \$500 million in damages and the parties settled for an award of \$130 million in damages in 2010.

In 2013, Windstream Energy LLC, another American company, filed a Notice of Arbitration, claiming the Government of Ontario had violated several of its obligations under NAFTA, and that this resulted in Windstream's loss of approximately \$475 million in investment. Ontario had decided to defer Windstream's offshore wind development due to a lack of both necessary scientific research and an adequate policy framework. While the NAFTA tribunal dismissed the majority of the claims, it found that the government of Ontario failed to undertake necessary work to address scientific uncertainty, which was a breach of Article 1105, the Minimum Standard of Treatment, and ultimately awarded Windstream \$25,185,900 in damages and \$2,912,432 in costs.

There is currently a pending claim against Canada brought by Koch Industries and Koch Supply & Trading LP – both American companies – alleging violations of NAFTA with respect to alleged losses as a result of Ontario's change in policy in its carbon cap and trade programme. As noted above, CUSMA does not include such a mechanism to commence investor-state arbitration proceedings through Canada, though there are transitional provisions that permit claims relating to investments made prior to CUSMA for a limited period of time.

Many renewable energy contract disputes are resolved by confidential arbitral awards.

## 9 Updates and Recent Developments

**9.1 Please provide a summary of any recent cases, new legislation and regulations, policy announcements, trends and developments in renewables in your jurisdiction.**

There have been significant legislative developments in Canada in the last several years with respect to renewable energy, including the passing of the *Canadian Net-Zero Emissions Accountability Act*, which legislates Canada's international commitments for emissions reductions and the *Greenhouse Gas Pollution Pricing Act*, which sets minimum national standards for GHG pricing. The federal government has also released regulations in 2022 establishing a GHG offset programme.

In 2022, the federal government also published new Clean Fuel Regulations, which set strict requirements on fossil fuel importers and producers, and also establish a credit market for annual carbon intensity reduction. The Clean Fuel Regulations require suppliers to reduce the carbon intensity of gasoline and diesel that they produce or import by 3.5 grams of carbon dioxide equivalent per megajoule (gCO<sub>2</sub>e/MJ). This number will increase by 1.5 gCO<sub>2</sub>e/MJ every year until 2030, where it will be set at 14 gCO<sub>2</sub>e/MJ. The Clean Fuel Regulations are part of a larger 2030 Emissions Reduction Plan, which sets Canada's emissions reduction target at 40% below 2005 levels by 2030, and net-zero by 2050.

In 2021, the *Greenhouse Gas Pollution Pricing Act* survived a constitutional challenge at Canada's highest court by three provincial governments, which alleged the legislation was outside the scope of the federal government's jurisdiction.

Some provinces have also challenged the constitutional validity of the federal *Impact Assessment Act (IAA)*. The IAA was enacted in 2019 and reformed the environmental assessment process for specified energy projects by, among other things, including a requirement to consider sustainability factors as part of any environmental assessment. The Alberta Court of Appeal found that the legislation was unconstitutional in May 2022. The Supreme Court of Canada heard the matter on appeal in March 2023, and a decision is pending.

There have also been significant developments with respect to the rights of Indigenous peoples in Canada. In 2019, the provincial government of British Columbia passed the *Declaration on the Rights of Indigenous Peoples Act*, which seeks to align the province's laws with the rights and principles set out in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). UNDRIP states that governments must consult and cooperate with Indigenous peoples to obtain their "free, prior, and informed consent" in regard to projects, including energy projects that may affect Indigenous interests. The new legislation does not make UNDRIP law in British Columbia but rather mandates a process to ensure that provincial laws are consistent with UNDRIP, with an emphasis on further reconciliation, accommodation and Indigenous self-determination.

The federal government passed UNDRIP legislation in June 2021 that is quite similar to British Columbia's statute. The federal statute does not import UNDRIP into domestic law, but affirms that UNDRIP has application in Canadian law. The federal statute requires the responsible Minister to develop an action plan in consultation with Indigenous peoples to achieve the objectives of UNDRIP.

Both the federal and British Columbia governments have said that their respective statutes do not grant a power to Indigenous groups to veto resource projects. Most new renewable energy projects in the traditional territories of Indigenous groups in

Canada are expected to provide benefits to impacted groups, and an emerging trend is to consider co-ownership of energy generation and transmission infrastructure projects with Indigenous groups. Going forward, it is expected that there will be a greater emphasis on Indigenous co-ownership in British Columbia and other jurisdictions, with both Crown and private corporations pursuing co-ownership opportunities with local Indigenous groups.

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We have been involved in major electricity and alternative energy projects developed by private developers, Crown corporations, provincial and territorial governments, and local governments. Our firm's extensive experience is multi-dimensional; we have been involved in projects ranging from financing and project structuring, to permitting and approvals, and ultimately to operations.

We regularly act for clients in British Columbia, Alberta, Saskatchewan, the Northwest Territories and Nunavut, including in regard to projects that

cross provincial boundaries (i.e., federally regulated). We provide commercial, litigation and regulatory representation and we have unparalleled expertise in Indigenous, environmental and public utility law, as well as all aspects of public law (administrative, constitutional and customary international law).

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