

[00:00] HUSEIN: This is episode 95 of Lawyered. I'm Husein Panju. And on this week's episode, we're chatting about oil and gas law with Vivek Warriar, renowned lawyer and the president of the Canadian Energy Law Foundation.

[00:18] First up, we'll speak about a new Supreme Court decision regarding Canada's federal environmental assessment framework. This new decision found that the current framework overreached beyond its jurisdiction, and we'll discuss how the response might survive further challenge. We'll also chat about the government's recently announced plan to limit oil and gas emissions through a cap-and-trade model, and we'll cover what we know about the framework to date, and how this might be implemented in practice.

[00:45] And later on, we'll discuss a new creative tool called Carbon Contracts for Difference. This type of contract is aimed to provide more certainty to de-risk emission reduction projects, and we'll cover the most important elements to understand. And finally, in our Ask Me Anything segment, Vivek will respond to questions submitted by our listeners on a range of topics, including climate litigation, the rise of renewable energy, and special considerations for indigenous co-ownership. All that and a whole lot more is coming up in just a bit. This is Lawyered.

[Music Break]

[01:25] Hey, everybody, and welcome to another episode of Lawyered. We are now at episode number 95, which means that we are surprisingly now halfway through the final season of the podcast. Very happy with how it's going so far, and thanks so much for all your support for listening both now and throughout this series.

[01:43] I want to just call out our last episode, which was episode number 94. It was a really great discussion. We spoke about the area of gender equality law with Pam Hrick, who, amongst other things, is the Executive Director of LEAF, which is the Women's Legal Education Action Fund. Really powerful discussion about this area of gender equality law. We spoke about a number of topics, including a new proposed bill, which is called Bill 332, that would make coercive control a criminal offense.

[02:16] We also spoke about some new queer and trans rights litigation that's been going through regarding the use of preferred pronouns in a school context. And we also spoke about Bill 21 from Quebec, which you may be familiar with. And while a lot of the focus traditionally has been on the issues in that bill regarding our religious discrimination and freedom of speech, we spoke in this episode about how this also may implicate Section 28 of the Charter as well. So really powerful discussion, especially in the equity space. We do a lot of deep diving on principles about equity theory, including a really fascinating discussion about intersectionality.

[02:59] As Pam mentioned in the episode, that term, unfortunately, is often used as a buzzword without much thought. But we really go into the nuts and bolts of what that means. And that concept really pervades through a lot of the things that we discussed in the episode. So highly, highly recommend this episode, number 94, in our archive.

[03:18] A completely different area of law, which is the area of oil and gas law. As you likely know, this area of practice impacts pretty much the entire country's operations and is having a significant impact on our way of life, especially as energy needs change and emissions targets may be fluctuating as well. We wanted to find someone who was really well-versed in this particular area of law. We found an excellent lawyer who was involved in the energy bar at large and also broadly in the community. And so with that, please enjoy our conversation with our guest Vivek Warriar.

[Music Break]

[03:53] Vivek is a partner in the corporate group of the Calgary office of Osler LLP, and his practice focuses on the energy value chain from extraction or generation, transportation, and transmission to the marketing of energy products to end users. His practice also includes private M&A transactions, and he frequently advises clients in the structuring, ownership, and operations of energy infrastructure projects. He is also representing clients on transformative projects, including the development of liquefied natural gas export facilities, equity participation transactions between energy industry project proponents and First Nations, renewable energy partnerships, and the development of linear infrastructure projects throughout Canada.

[04:37] Vivek is also the president of the Canadian Energy Law Foundation, serves on the executive of the ABA International Energy Environmental Law section, and has also taught oil and gas contracts at the University of Calgary Faculty of Law. He's also extensively involved in the Calgary community, including as co-chair of the overall United Way of Calgary and Area Campaign, and as past chair of the board of directors of the Center of Newcomers. So Vivek, thanks for joining us on the show today.

[05:05] VIVEK: Oh, my absolute pleasure, Husein. Thanks for having me.

[05:08] HUSEIN: Of course. Very nice to have someone from out west on the show. One thing I wanted to ask regarding to the topic, just as you mentioned, you've got a bunch of community work that you're involved in. One thing I wanted to ask you about in particular is your work with the United Way of Calgary and Area Campaign. I think myself and a lot of other lawyers are very well familiar with the organization. Tell us more about how you got involved with this group.

[05:32] VIVEK: Yeah. I mean, listen, being involved in the community is an incredibly important thing for me. Personally, it's also very strongly encouraged by my firm at Osler. It just really resonates to have the opportunity to contribute to the well-being of my fellow citizens in this way. So, I started working, volunteering with United Way at a very basic level, just helping out where I could, moved into more of a fundraising role a few years ago for something they call their major donor cabinet, which is connecting with people who make donations in the neighbourhood of \$10,000 or more.

[06:19] But from there, they asked me to co-chair the overall campaign, which is really more of a role in terms of galvanizing the spirit of giving that already exists in this community. As

you know, the United Way is an umbrella agency. So it connects with a lot of partner agencies that address almost every conceivable social ill, including mental health issues, youth gang issues, poverty reduction, and also assisting newcomers to the community in finding their feet and flourishing.

[06:56] HUSEIN: That's great. Do you find that there's some overlaps between that and your day-to-day work?

[07:01] VIVEK: Yeah, I think there's definitely some intersections there. And I think, I ultimately, Husein, just love meeting people and understanding what social issues are particularly important for them to address. And understanding that has helped me understand not just the broader community, but also the business community so much better than I would otherwise. The compassion and kindness and generosity of Calgarians is just... Learning more about that every day is deeply fulfilling.

[07:41] HUSEIN: And it's still like to work that directly impacts the community in light of the work that you do as a day-to-day, I'm sure.

[07:46] VIVEK: Absolutely.

[07:48] HUSEIN: So we've got a bunch of fascinating topics to speak about in your area of practice, which is oil and gas law. The first I'm going to talk about is a new Supreme Court decision involving the Impact Assessment Act. Now, in October of 2023, the Supreme Court released an important ruling regarding Canada's federal environmental assessment framework. The statute provided that certain large-scale developments, like pipelines and offshore drilling operations, must undergo a full assessment before proceeding.

[08:17] However, the court found that portions of this federal legislation overreached beyond its jurisdiction and allowed the federal government to deny projects based on overly broad considerations. And in response, the government is now working on amending this framework to be constitutionally compliant, and the result may have meaningful impacts on the sector as well. So Vivek, I know that this Impact Assessment Act relates to assessing what are called designated projects. So let me start by giving us a very high-level description of what kind of projects we're talking about here and what impact assessment really means.

[08:51] VIVEK: Right. So, Husein, I think your question gets to kind of the heart of the constitutional challenge here, which was ultimately successful. I'll address your second question first. What is an impact assessment? So perfectly reasonable to expect that in an advanced economy like Canada, if somebody is building a major facility that crosses provincial borders or is otherwise within federal jurisdiction, that the federal government will require a fulsome and comprehensive environmental assessment of that project to take place.

[09:30] We've had a regime like that in place that has been recognized as wholly constitutional since 1992, a case called Old Man River. And the purposes of the assessment are exactly what you'd expect to do, ensuring that the project fosters sustainability, ensures that it is protecting the environment and health and social and economic conditions. It is

mitigating any adverse effects caused by those projects. And it's ensuring that the rights of Indigenous peoples are respected.

[10:05] So where the Impact Assessment Act—and I'll use the acronym IAA at times—took this in what was ultimately deemed to be an unconstitutional direction, is how the legislation described what a designated project was. So ultimately, what the court found was that the designated projects definition in the legislation dramatically expanded the scope of what types of projects were subject to a federal impact assessment well beyond what was within federal jurisdiction.

[10:48] So, what were those projects? Well, as you'd expect, they are large projects that have the potential for adverse and complex effects in areas of federal jurisdiction. But how that was defined was that a designated project would be a project that has adverse effects within federal jurisdiction. And furthermore, the legislation created a broad degree of discretion on the part of the minister to designate a project for review. So whether or not it fell within the four walls of the legislation, the minister could exercise his or her discretion to say, no, we're going to review this because we just deem it necessary to review.

[11:47] HUSEIN: You mentioned the Supreme Court held in this recent decision that portions of this act were unconstitutional. So the decision is called Reference Re-Impact Assessment Act, and the citation is 2023 SCC 23. Can you tell us a bit more about how the court came to this conclusion?

[12:06] VIVEK: Yeah. So the court, I think, undertook an extensive review of the history of environmental assessment regulation, legislation on the federal side against going back to the Old Man River decision in 1992, and kind of traced how the IAA had moved from what they described as a decision-based trigger. So originally, and for many, many years, the environmental assessments from a federal perspective were triggered when the federal government was required to give a consent or approval to a project because maybe it was an intra-provincial pipeline or transmission line, or it was a project that, again, traversed intra-provincial navigable water or, again, triggered a review under the Fisheries Act.

[13:12] One of the things that the Supreme Court pointed out repeatedly was the fact that there were a large number of factors that could trigger a federal review. But on top of that, the act specifically said essentially that any matter that the impact assessment agency deemed relevant could trigger a review. You can imagine what extraordinary uncertainty that would cause for a potential project proponent or investor in a project to not be able to definitively understand whether or not they'd be subject to a federal assessment or not.

[14:00] HUSEIN: Absolutely. So, I know that earlier this spring, the government tabled some new amendments to respond to this decision, like some dialogue with the courts, this budget bill called Bill C-69. So, we're recording this in August of 2024. So at the time of this recording, these amendments are not yet final. I was wondering if you can tell us about your thoughts on the amendments that have been advanced so far.

[14:22] VIVEK: Yeah, absolutely. The best description and one that came directly from the minister in this case is that the intent of these amendments to the act was to be as surgical

as possible. The problem with that approach is that the Supreme Court was pretty definitively that the act was almost wholly unconstitutional. So, I'm not sure a surgical approach will be sufficient to immunize it from any further constitutional challenge.

[14:59] HUSEIN: Okay. I know that part of the amendments include better coordination with provincial governments as well, right?

[15:05] VIVEK: That is definitely a feature of the amendments requiring more dialogue, cooperation, collaboration with provincial governments. One of the key issues was the broadness of the term "effects within federal jurisdiction," which if there was an effect within federal jurisdiction, that could trigger a federal impact assessment. The government has proposed replacing that with more specific language that relates to non-negligible adverse effects within federal jurisdiction.

[15:42] So I think what they're trying to do there is establish a de minimis test. So it can't be, again, a relatively non-material adverse effect. It has to be significant. Specifying that it must be an adverse change, I think also is helpful, though I'm not sure it gets us all the way there. The issue remains that those adverse changes do not specifically relate to necessarily the environment. It could be a socio-economic effect that is deemed to be within federal jurisdiction, but to me, that remains relatively broad and relatively open to politicization.

[16:36] HUSEIN: All right. So I know that these amendments are not yet final, but assuming that they do get passed, what do you think that olden gas lawyers should be thinking about in light of this new amended version of the act?

[16:47] VIVEK: I mean, I think the advice that we'll be providing our clients is, again, our clients, to the extent they're pushing projects forward, will have to comply with the amended act pending any further challenge, which I'm fairly certain will occur.

[17:12] HUSEIN: If the amendments do pass, are there any strategic considerations that you might want to oblige your clients to in terms of how they might want to engage with groups or anything like that?

[17:20] VIVEK: Yeah. Listen, I think the issue with the approach from an industry perspective is it's so broad—it was so broad as to not necessarily provide real guidelines or a roadmap in terms of how to approach things. I think part of the advice that we would continue to deliver is focus, as all of our clients do, on mitigating any adverse effects, complying with all regulation. And I've made the point before, and I'll make it again, we have probably the most strict regulation of energy projects on earth, and our clients like that, because again, there's clear designated guidelines on how to approach that.

[18:17] So the concern about this act was it blurred those lines. I think at the end of the day, our advice will remain the same, continue to adopt best practices, and hopefully through dialogue with the industry, the government will achieve a higher level of certainty in the legislation.

[Music Break]

[18:48] HUSEIN: In response to the rising impacts of climate change, the federal government recently announced plans to cap oil and gas emissions, and this will primarily be implemented through a cap-and-trade model under the Canadian Environmental Protection Act. And this model demonstrates Canada's commitment to a net zero future by 2050, and these regulatory changes are prompting plenty of dialogue amongst lawyers in the oil and gas community. So Vivek, a big component of this model is a cap-and-trade system for oil and gas sector emissions. I know that this is a very politically charged issue as well, including in your part of the country. Can you just give us a brief overview of how this system is intended to work?

[19:28] VIVEK: How the framework works is it prohibits oil and gas facilities from emitting greenhouse gases unless they're registered under the federal cap-and-trade system that will be implemented through this regulation. Once you are registered, that allows a facility to emit a certain amount of GHGs in any given year. So the regulator will be establishing a set number of emissions allowances, and then those allowances will be attributed to covered facilities.

[20:03] HUSEIN: And that's the cap part.

[20:04] VIVEK: That's exactly it. And all of this, if it sounds a little nebulous at this stage, it's because it is. We're at an introductory level of these regulations, and there will be lots of back-and-forth discussion with the industry and other stakeholders.

[20:21] HUSEIN: And what's the trade part?

[20:22] VIVEK: So the facilities will be required to establish that cap, and they will earn emissions allowances or other eligible compliance units for each ton of GHG emissions they emit up to their legal upper bound in a given year. So that legal upper bound will be set by regulation and is the maximum emissions the sector will be allowed to emit in that year. Over time, the expectation is the government will allocate fewer emissions allowances to require the covered facilities to either cut emissions by allowances so they can actually purchase allowances from the government that allow them to emit.

[21:10] If you contribute money, you can actually pay money for the right to emit further, assuming that you've done everything you can to mitigate your emissions to begin with. So those contributions would then be used to support oil and gas companies, decarbonization efforts, whether it's through further investment in carbon sequestration or other forms of technology.

[21:38] HUSEIN: How would that influence legal compliance strategies for those players in this industry?

[21:45] VIVEK: Well, I think what, again, it's all somewhat ephemeral at this point, but at the end of the day, that is going to be one tool in the toolbox for energy companies in terms of how they address this. Should this emissions cap come to fruition, they will, I think, also use this tool where, you know, after having deployed all the other efforts to reduce their

emissions, it'll operate something like a safety valve where, you know, if push comes to shove, you can spend the money to obtain these credits that give you some coverage, which have the solitary effect ultimately of being reinvested into that circle of sustainability-based investment.

[22:38] HUSEIN: So I know that this framework also has some provisions to account for reporting and verification of emissions to make sure that, you know, the numbers are accurate, especially if there's going to be a cap-and-trade system. Can you tell us more about how that is intended to work?

[22:52] VIVEK: Yeah. So, again, still very early days, but the framework will require, as currently written, all covered facilities to submit annual reports that include their GHG emissions, annual production, and also to somehow quantify their indirect GHG emissions. Not entirely clear how that is going to work. That requirement is currently scheduled to begin in 2026, and the government is currently working on a quantification scheme to implement within the regulations. Still a lot of speculation of how that's going to look. And hopefully that will be developed, again, should this proceed, in regular and deep consultation with industry.

[23:49] HUSEIN: Given that this is still very high level right now, what role do you anticipate lawyers will have in this process?

[23:56] VIVEK: Just like in any level of regulation, whether it's, you know, on the security side or competition or international trade, I think lawyers will have a key role in the reporting in terms of making sure that our clients are in compliance and are meeting, if not exceeding, the requirements of the regulation.

[24:19] HUSEIN: What do you think, as someone who practices in this area, about using this emissions cap as, like, a legal tool to address climate change and get into a net zero future?

[24:29] VIVEK: Reducing emissions, enhancing sustainability of operations are at the top of mind for all of my clients. And it is a sincere, authentic, strategic goal for all of them. And I guess my view of this is it's a bit of a blunt instrument, partly because it is sector specific. So, fully recognize that the oil and gas industry is one of our largest emitters in Canada. But at the end of the day, there are other significant sources of emissions. And it's interesting that the federal government has chosen to focus on this specific industry and not, for example, transportation, airlines, automobiles. It's an interesting focus on the deliverers of energy, as opposed to the consumers of energy, which may not make a lot of sense.

[25:32] The government of Alberta commissioned a report from Deloitte to consider whether or not, what the ultimate effects would be. And obviously, having been commissioned by the government of Alberta, it may be colored to a certain extent. But the report from Deloitte found that, you know, we're talking about lost trillions of dollars of investment, possible reduction of GDP by 4.5%, and 54,000 jobs lost, which without necessarily a meaningful reduction in global emissions, in any case.

[26:12] HUSEIN: And you mentioned that there may be a legal challenge to this in the future once it takes more proper form. Can you tell us more about what that might look like?

[26:20] VIVEK: Yeah. Almost certainly, there will be legal constitutional challenges from Alberta and Saskatchewan, probably on the same basis as we've already talked about in relation to the Impact Assessment Act, in the sense that this is an overreach of federal power into areas that are really of exclusive provincial jurisdiction under Section 92. I guess the other part of it, as you mentioned, is the politics of it. We do have a relatively imminent federal election, which could see this entire scheme go away if, you know, if the Conservatives win, they've certainly indicated that they would shelf this.

[Music Break]

[27:20] HUSEIN: The \$15 billion Canadian Growth Fund has launched a new \$7 billion initiative known as the Carbon Conduct for Difference, also known as a CCFD. And this type of conduct is designed to stabilize the future price of carbon with an eye towards providing more certainty to business and to de-risk emission reduction projects. And this tool has been used in countries around the world, and may be a valuable tool as well in Canada's decarbonization strategy. So Vivek, can you give us a brief description of what a Carbon Conduct for Difference is and how it works?

[27:54] VIVEK: Absolutely. And, you know, again, I have a bit of a catbird seat here because at Osler, we have acted for the Canada Growth Fund on each of these types of transactions they've done so far. It's a very, I think, excellent tool in the government's toolbox to alleviate some of the volatility that might otherwise disincentivize investment in decarbonization projects. They are a tool that mitigates political risk.

[28:28] So when somebody is undertaking a project like a carbon sequestration project, where you are capturing carbon emissions, the price tag is in the billions of dollars. Part of the revenue stream that you are relying on on your financial modeling are the credits that you will generate through provincial programs. So in Alberta, it's the TIR program, where you would generate credits that are tradable, that have value, that are ultimately used to either offset your own emissions or, again, you can monetize them by trading them to other project proponents who may need them to offset their own emissions.

[29:21] So that value stream is, of course, subject to a great degree of political risk because another government could come along in four years into a project that's expected to operate for 20 years and say, we're eliminating this entire program. And then all of a sudden, that part of your revenue stream goes up in smoke, completely evaporates. So, what the Contracts for Difference do is the federal government coming in and saying, hey, we will do a transaction with you where we will give you a floor price for those credits for the duration of your project to ensure so that you can have certainty about that aspect of your financial modeling, thereby incentivizing you to continue with your investment in the carbon sequestration project or the renewables energy project or whatever it might be.

[30:23] One of the transactions that was done recently, the Canada Growth Fund announced a \$200 million contract with a company called Entropy, which is pursuing a

carbon capture utilization and sequestration project. They entered into a fixed price carbon credit purchase commitment, whereby the Canada Growth Fund will purchase 185,000 tons per year of carbon credits for 15 years from Entropy. So they know that is happening. Obviously, eases the financial uncertainty in terms of your overall returns on the project. It also facilitates financing because it injects a little bit more certainty into the overall project.

[31:07] HUSEIN: If you are a lawyer who's engaged in negotiating one of these Carbon Contracts for Difference, what are some things for them to keep in mind?

[31:16] VIVEK: The number one issue from the project developers perspective is term. So, you would want this carbon contract for difference to have a long-time horizon that fundamentally aligns with the operational life of your facility. At the same time, recognizing our election cycle is four to five years, you want it to mitigate that political risk. And so extend at least over a couple of election cycles. Pricing, more of a commercial business negotiation, but again, that's a key issue and will be predicated on forecasting of carbon market prices, carbon pricing forecast, what your capital costs for the project are.

[32:11] These types of contracts are really a mechanism to shift risk away from the developer and on to the government. Ultimately, the government is responsible to its tax players. So there'll be significant negotiations about mitigating that risk. Like what happens if we've done this contract and your project doesn't proceed? Or six years into the term, it's not performing as expected. So there'll be negotiations around the off ramps for the government in those types of scenarios.

[32:53] And then of course, there's change of law risk, even without a change in government necessarily, it could just be a change in priorities. Or maybe there's a provincial piece of legislation that impacts what the project proponent is doing. So, there'll be a negotiation around what remedies or steps that either party can take in the event of a change of law that fundamentally impacts the transaction.

[33:31] HUSEIN: These contracts are unique in that they are quite lengthy, as you mentioned, 15 years or so. So are there some special considerations that a when working on a contract that's going to last for this long, either at the drafting stage, or while the contract is live?

[33:50] VIVEK: Yeah, look, it involves a real significant forward-looking exercise where you're trying to imagine what could happen 10 years down the road. So very different, for example, than an M&A transaction where it's like, after you get whatever regulatory approvals you need, you will close and everything's done. This requires some prescient thinking to try and understand what the landscape may look like 10 years down the road, which is a very different negotiation, I think.

[34:29] HUSEIN: So how does one go about doing that?

[34:31] VIVEK: Well, I think it's nuanced. Certainly, it's a dialogue with the business that you're representing to understand what their long-term concerns are and trying to address those risks in the document, even if they aren't manifesting at the moment. If there's a

possibility that that risk could crystallize five to 10 years down the road, you have to try and address it, which isn't always easy, because it involves a lot of theoretical speculation at times.

[Music Break]

[35:13] HUSEIN: And to wrap up, we're going to do our Ask Me Anything segment with Vivek to speak about the questions that were submitted about oil and gas law. One of the bonus awards for members of our Lawyered Patreon crowdfunding community is the opportunity to submit questions that they want to hear answered on the show, which can be questions about anything within our guest area of expertise, so long as they're not asking for legal advice. We usually do a call for our questions about a week before each recording, and we still have a couple more recordings left for this season.

[35:38] So if you want to learn more about how you can become a patron and submit your own question to our upcoming guests, and get other bonus awards like early access to our episodes, you can check out our crowdfunding website, which is www.lawyeredpodcast.com/patron. That's www.lawyeredpodcast.com/patron for more info. So Vivek, this is one of the most amount of questions we've gotten in some time for the Ask Me Anything segment, a bunch of fascinating current issues. So first one is, what are some of the current and recent legal challenges facing major pipeline projects, including the Trans Mountain? I know there's a lot to cover, but happy to get an overview of what you see as the current status of these projects.

[36:18] VIVEK: Thanks, Hussein. And thanks for all your listeners who have submitted questions. It's fun to talk about this stuff. Trans Mountain, I think, is a great case to highlight. It faced innumerable legal challenges, constitutional challenges, every type of challenge imaginable, but is now finally operational, I think, roughly 16 years after it should have been. As we talked about when we were discussing the Impact Assessment Act, is the uncertainty around regulation, where the goalposts are, not just in terms of what a project proponent needs to achieve and demonstrate to allow the project to go forward, but also the timeline is just prohibitively long.

[37:16] And we're not just talking about pipelines or even just oil and gas infrastructure here. I'm talking about energy infrastructure, whether it's a transmission line, because we're going to have to build out massive, massive transmission capacity in this country if we want to be net zero and electrified by 2050. So that will not happen if our regulatory timelines remain as they are.

[37:41] HUSEIN: So do you have any room for optimism that this will be addressed in some way?

[37:45] VIVEK: I think that where the optimism, and I'm occasionally described by my colleagues as a pathological optimist, is the idea that for our decarbonization efforts to succeed, we need to streamline development of necessary infrastructure to allow, for example, the development of national electric vehicle charger networks, transmission lines between interprovincial transmission lines that allow provinces that have emitting sources

of electricity to get electricity from provinces that have non-emitting sources of electricity. So that type of infrastructure, the build-out, again, is hard to contemplate. The numbers that I've seen are actually in the trillions as opposed to billions. So to make that happen, we will need a regulatory system that is infused with certainty, that is streamlined, and that is efficient, to say the least.

[39:04] HUSEIN: All right. So the next question is about ESG. And we spoke about this more detail on a previous episode. But the specific question here is, how is ESG, that being environmental, social, and governance criteria, influence investment and legal issues in the oil and gas sector?

[39:21] VIVEK: As ESG considerations became more prominent, emphasis tended to be on the E. There were many investment houses, banks that took the position they were no longer going to invest, for example, in upstream oil and gas development. I think that, first of all, a lot of that has retreated as concerns about energy security have come back to the fore after the Russian invasion of Ukraine and the removal of many millions of Russian barrels from the global oil market, the massive cutback in the use of Russian gas. All of this created an atmosphere where people were much more concerned about energy security. And balancing that with ESG considerations, has kind of brought us back to, I think, a more balanced view.

[40:30] HUSEIN: And what about on the legal side?

[40:31] VIVEK: Sure. ESG considerations have always been top of mind. Environmental performance, I mean, again, I'll reiterate, we have the strictest environmental regulations, possibly on earth. Compliance with those is a key strategic goal of every oil and gas company. But on the social and governance side, I think that's also been a key strategic goal, in the sense that a lot of these operations occur in areas that intersect with stakeholder communities, whether it's First Nations, Indigenous communities, or other communities where companies strive to implement best practices to deliver benefits to local communities where they can, from where we'll probably see the most legal compliance impact is on the governance front.

[41:36] And I think, for example, I'm not a securities lawyer, but we can clearly see the trend with securities commissions moving towards requiring some level of mandatory ESG reporting. It remains, I think, a major topic of interest and one that has been internalized in terms of how oil and gas companies view their own performance beyond just a financial return perspective.

[42:11] HUSEIN: All right, great. The next question is, how is the oil and gas sector been responding to the rise in investment and public support of renewable and alternative energy sources?

[42:21] VIVEK: Leaders in the oil and gas industry will recognize that there is going to be an evolution in the energy mix that, over time, will increasingly feature renewable sources of energy. There will, in my humble estimation, always be a role for oil and gas in a number of different ways. Some of the biggest investors in renewable energy projects in this country

have been major oil and gas companies. Just a couple of years ago, Suncor sold its very large portfolio of wind and solar developments to ATCO for close to \$1 billion. But the fact is, they had invested and developed those projects to begin with. Enbridge, many other companies are heavily invested in renewables projects. They view themselves as energy companies, and they're not necessarily limited to oil and gas.

[43:25] HUSEIN: How do you see the oil and gas sector evolving in the next 20 or 30 years? I know that renewables are intended to make a big upswing, right? Yeah.

[43:30] VIVEK: No, I think you'll see these companies continue to evolve. Their core strength is extracting and delivering energy. So, that is not a big shift to say, I'm generating and delivering energy.

[43:52] HUSEIN: All right. Next question is about climate litigation. The question in particular is, how is the rise in climate litigation affected the legal strategies of oil and gas companies in Canada?

[44:03] VIVEK: It's essentially a public interest litigation where a group of citizens prosecute a claim on the basis that this class of companies, or I think the Swedish case was actually against the government, have not taken sufficient steps to mitigate the ways that they may be exacerbating climate change, or alternatively, that they are actively contributing to climate change. The claims can be in the billions of dollars. Obviously, that's a significant risk and concern.

[44:51] I am skeptical to a certain extent, certainly not a litigator, but skeptical to the extent which those claims could be successful in Canada. At the same time, I don't think you would be a responsible energy executive and not take account of the risk and actively curate your operations and your governance to try and insulate yourself from that type of claim.

[45:24] HUSEIN: Do you anticipate that we might be seeing more of this kind of litigation in the future?

[45:28] VIVEK: I think almost certainly. What I can't speculate on is whether or not it will be successful.

[45:33] HUSEIN: Sure. Fair enough. The last question that's been submitted is, what are some considerations related to indigenous co-ownership and joint ventures on oil and gas ventures on their land?

[45:44] VIVEK: I'm really glad someone asked that question, Hussein, because I think it's been an absolutely stunning and fascinating trend in the industry. As I mentioned earlier, a lot of oil and gas operations take place in parts of the country, Alberta, BC, and Saskatchewan most prominently, which are traditional territories of indigenous communities. The industry has been collaborating with these communities for a long, long time. What we've seen, I would say, in the last 10 years is a move away from the traditional impact benefits approach, where a company that wanted to conduct operations near an indigenous community would enter into an agreement to ensure that some of the benefits

of those operations were delivered to the indigenous community, including access to jobs or to contracts to assist in operations, funding for schools, etc. Move towards more active, collaborative partnerships with these communities, where indigenous communities actually take an equity ownership interest in the project.

[47:10] So, what does that do for the indigenous community? One, it delivers to them a long-term revenue stream that is certain. It gives them a seat at the table in terms of governance of the project, in terms of ensuring that the environmental and cultural expectations that they have are being met. It fundamentally aligns the project, the energy industry participant, and the First Nation in terms of the development of that project, the operation of that project over the long term. It is effectively table stakes now for any investor that wants to develop a major energy infrastructure project to collaborate and partner with First Nations as true owners of the project.

[48:09] HUSEIN: Now, are there any specific strategies that one would recommend for energy producers or developers when they're working with First Nations groups, above and beyond the duty to consult obligation?

[48:19] VIVEK: Yeah, sure. Look, there are some very specific considerations when it comes to these types of agreements. I think, first and foremost, the governance rights granted to the indigenous community need to be meaningful. There is a lot of tax structuring required, because in many cases, of course, as you know, First Nations want to preserve their tax status. There are the longer-term impacts of the project issues, and that, I think, if you're negotiating from the perspective of the indigenous community, you want to be refreshed and reviewed at regular intervals. So, there's a lot of specific considerations to be thought about in developing these kinds of long-term relationships.

[49:27] HUSEIN: So Vivek, I want to thank you again for joining us on the show to talk to us about these important issues. I know, being from Calgary, this oil and gas is very much a part of the culture and the economy. So it's really nice to learn more about how these legal issues manifest themselves and how they're developing in light of recent trends. So I want to thank you again for your time, and I'm looking forward to staying in touch in the future. Well, thanks very much, Hussein. I think this was a lot of fun.

[49:48] VIVEK: I really enjoyed myself. Hopefully, I answered everyone's questions somewhat fulsomely. And I really enjoy the podcast and keep up the great work.

[Music Break]

[50:09] HUSEIN: And that's going to do it for this week's episode of Lawyered. Thanks for listening. On this week's episode, our guest was Vivek Warriar. You can learn more about him and his impressive work at his firm's website, which is www.osler.com. And for more about today's show, and for links to all the cases and issues that we spoke about today, you can find those on our website, which is www.lawyeredpodcast.com.

[50:32] And on our next episode, we're going to be switching things up and talking about the area of transportation law. Our guest is going to be Heather Devine, who works in-house

as the Chief Legal Officer of TRAFFIX, which is a leading third-party logistics provider. And we're going to be speaking about a bunch of exciting issues in this area, including a new piece of legislation that's aimed to crack down on the towing industry, some new updates in terms of competition act merger thresholds, as well as a new divisional court case regarding the direct application of the principles of offer and acceptance.

[51:06] And if you want to help to improve the show and get some neat and affordable legal rewards, including the opportunity to submit questions for our show, getting early access to every episode, and unlocking the full bonus episodes that we've done throughout this series, I'd be very helpful if you could check out our crowdfunding website and become a patron of our show. You can find out more about that on our crowdfunding page, which is www.lawyeredpodcast.com/patron. That's www.lawyeredpodcast.com/patron for more information.

[51:41] If you haven't done so already, for whatever reason, you can subscribe to our podcast for free on iTunes and pretty much everywhere else you can get podcasts. You can also follow the show on Facebook, LinkedIn, or on Twitter, and our Twitter handle is @LawyeredPodcast. Our sound editing work is managed by Solomon Krause-Imlach, theme music by Ben Swirsky, and website help from Steve DeMelo.

[51:54] And finally, please advise that while the show is aimed to be helpful and informative, that it is not legal advice. However, if you do want legal advice, please reach out to a lawyer directly to help you with your particular situation. And with that, we'll see you back here in two weeks' time. Until then, keep it legal.