Alberta Energy Regulator

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January 16, 2017

Via Email Only

Boughton Law Corporation
Attention: Tarlan Razzaghi

Osler, Hoskin & Harcourt LLP
Attention: Sander Duncanson

McPherson Leslie & Tyerman LLP
Attention: Meghan Conroy

Olthius Kleer Townshend LLP
Attention: Larry Innes

Sunrope Consulting Services Ltd.
Attention: Cynthia Bertolin

JFK Law
Attention: Mark Gustafson

Dear Counsel:

Re: Application Nos. 1778538, 00370772-001 and 001-341659
Prosper Petroleum Ltd (Prosper) Rigel Project (the "Applications")

This letter is further to my letter of January 5, 2017 advising that the panel had made a decision on the recusal requests submitted by Fort McKay First Nation (FMFN). FMFN objected to Commissioners Jude Daniels and Christine Macken sitting on the panel and requested that they recuse themselves from the hearing into the Applications. FMFN's submissions alleged a reasonable apprehension of bias.

The panel's January 5th letter provided that,

> Neither Commissioner Daniels nor Commissioner Macken will recuse themselves from the panel sitting to hear Prosper's application. FMFN has not demonstrated that a reasonable apprehension of bias is raised by either Commissioner Daniels or Commissioner Macken sitting on this panel. The panel's reasons for decision will be issued in the near future.

This letter provides the panel's reasons for its decision.

On December 9, 2016, the FMFN submitted a letter to the panel objecting to Hearing Commissioners Jude Daniels and Christine Macken sitting on the panel for the hearing into the Applications. FMFN requested that Commissioners Daniels and Macken recuse themselves from the hearing. That letter responded to a letter sent by the panel disclosing that from April 2008 to June 2014, while Commissioner Daniels was employed with TransCanada Pipelines Ltd. (TransCanada), she had worked with Sander Duncanson in his capacity as outside counsel to TransCanada.

The panel provided the other interested parties in this matter with the opportunity to raise concerns with Commissioner Daniels sitting as a member of the hearing panel deciding Prosper's Applications. No other concerns were received by the panel. Prosper was given the opportunity to respond to FMFN's letter; however, no response from Prosper was received.

FMFN submitted that a reasonable apprehension of bias is raised by Commissioner Daniel's prior professional relationship with Prosper's current lawyers at Osler, Hoskins & Harcourt LLP (Osler), including Mr. Duncanson. FMFN also submitted that it was relevant that Commissioner Daniels "had dealings with FMFN on TransCanada's developments in the region affecting Fort McKay's rights and interests".

With respect to Commissioner Macken, FMFN submitted that a reasonable apprehension of bias is raised because she sat on the regulatory appeal panel in Decision 2014 ABAER 013[1]. That panel confirmed the Alberta Energy Regulator's decisions to issue well licences and extend the public lands Letter of Authority to Prosper for its oil sands exploration program for the Rigel Project.

Test for a reasonable apprehension of bias

In *Wewaykum Indian Band* v. *Canada (Wewaykum Indian Band)*, the Supreme Court of Canada reiterated the test for an apprehension of bias as quoted in *Committee for Justice and Liberty* v. *National Energy Board*:

> … the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test "is what would an informed person, viewing the matter realistically and practically – and having thought the matter through - conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."[2]

The test for establishing a reasonable apprehension of bias is high and the onus of demonstrating the reasonable apprehension of bias rests with the party alleging it:

> The standard is the reasonable observer, not one with a very sensitive or scrupulous conscience: *Committee for Justice and Liberty* at p. 395. The grounds must be serious, substantial and based on a real likelihood or probability, not mere suspicion: *Boardwalk Reit LLP v Edmonton (City)*, 2008 ABCA 176 (CanLII) at para. 29, 91 Alta LR (4th) 49, 437 AR 199. Bald assertions of bias are not sufficient: *Ironside v Alberta(Securities Commission)*, 2009 ABCA 134 (CanLII) at para. 103, 11 Alta LR (5th) 27, 454 AR 285. In light of its legislative mandate, there is a strong presumption that the Commission and its panels will properly discharge their duties and are not tainted by bias: *Ironside* at para. 103.[3]

Under Section 9 of the *Responsible Energy Development Act* all hearing commissioners owe a duty of care in carrying out their power, duties and functions:

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[1] Prosper Petroleum Ltd. Regulatory Appeal of 24 Well Licenses and a Letter of Authority, Undefined Field, November 5, 2014.
[2] [2003] 2 SCR 259, 2003 SCC 45 (CanLII) at para.60 citing *Committee for Justice and Liberty* v. *National Energy Board*,(1976), [1978] 1 S.C.R. 369.
[3] *Lavesta Area Group Inc*. v. *Alberta (Energy and Utilities Board)* 2012 ABCA 84 at para 24.

9 Every director, hearing commissioner and officer of the Regulator, in carrying out powers, duties and functions, shall
   (a) Act honestly and in good faith,
   (b) Avoid conflicts of interest, and
   (c) Exercise the care, diligence and skill that a reasonably prudent person would exercise under comparable circumstances.

Commissioner Daniels

FMFN has not submitted that an actual bias exists, only that an apprehension of bias is raised by Commissioner Daniels remaining on the panel for this hearing.

Therefore, given the test outlined above, the questions for the panel to determine are: What would a reasonable informed person, viewing the matter realistically and practically – and having thought the matter through - conclude? Would this person think that it is more likely than not that Commissioner Daniels, whether consciously or unconsciously, would not decide the applications fairly?

Commissioner Daniels left her employment with TransCanada in June 2014. As part of her role, Commissioner Daniels maintained a professional relationship with the lawyers at Osler, including Mr. Duncanson, in relation to TransCanada's Grand Rapids pipeline applications. Commissioner Daniels was involved in TransCanada's aboriginal consultation with FMFN and occasionally worked with Mr. Duncanson. Although it filed a statement of concern towards TransCanada's pipeline applications, the public record shows FMFN withdrew its statement of concern prior to the hearing into the applications.

After leaving TransCanada in 2014, Ms. Daniels has had no contact with Mr. Duncanson or any other lawyers at Osler. Commissioner Daniels has had no other relationship with Mr. Duncanson other than that of solicitor and client while at TransCanada.

FMFN bears the onus of establishing a reasonable apprehension of bias. FMFN submitted that Commissioner Daniels had a professional relationship with Mr. Duncanson and other lawyers at Osler. FMFN has provided no evidence to suggest that her previous professional relationship with Osler, and specifically Mr. Duncanson, was sufficiently close or of such a nature that a reasonable informed person would have concerns about Commissioner Daniel's ability to make an impartial decision based on evidence to be presented and submissions made on the Applications.

Furthermore, as noted above, FMFN made the statement that Commissioner Daniels "had dealings with FMFN on TransCanada's developments in the region affecting FMFN's rights and interests", but has not provided any evidence to rebut the presumption that Commissioner Daniels will properly discharge her duty free of bias. Indeed, FMFN provided no evidence at all, let alone evidence that would lead a reasonable person to conclude that there is a real likelihood or probability that Commissioner Daniel's ability to make an impartial decision in the hearing is somehow impaired.

Finally, FMFN closes its submissions regarding Commissioner Daniels saying "…we do not believe a reasonable time has elapsed since her being on the 'opposing side' of Fort McKay to remedy an apprehension of bias." FMFN has provided no evidence to show that TransCanada and FMFN were opposed during the relevant period of time.

Therefore, the panel finds that a reasonable informed person, viewing the matter realistically and practically and having thought the matter through would conclude that there is no evidence of an apprehension of bias present in the circumstances. Instead the reasonable informed person would find that FMFN's claims are no more than mere suspicions or possibilities of bias. As outlined above, these are not enough to establish a reasonable apprehension of bias. Furthermore, the panel finds that the reasonable informed person would not conclude that it is more likely than not that Commissioner Daniels would decide the Prosper Applications unfairly.

Commissioner Macken

FMFN has not submitted that an actual bias exists, only that an apprehension of bias is raised by Commissioner Macken remaining on the panel.

Again the questions for the panel to determine are: What would a reasonable informed person, viewing the matter realistically and practically – and having thought the matter through - conclude? Would this person think that it is more likely than not that Commissioner Macken, whether consciously or unconsciously, would not decide the applications fairly?

FMFN submits that a reasonable apprehension of bias is raised because Commissioner Macken previously participated on a panel that made the regulatory appeal decision on approvals issued for Prosper's oil sands exploration (OSE) program for the Rigel project. FMFN further submits that the issues in the previous hearing are the same issues that will be raised in this hearing and since the panel upheld the approvals on appeal and made certain determinations, Commissioner Macken is inclined to also approve the Applications. It appears that FMFN is making the argument that Commissioner Macken has made a prejudgment on the Applications because of her involvement in the regulatory appeal.

FMFN correctly points out that the Alberta Court of Appeal has held that "when bias is alleged from the involvement of a decision maker in previous proceedings, the connection between the present proceedings and the previous proceedings is relevant." However, that sentence was qualified by the next: "Mere prior involvement with an issue does not inevitably lead to disqualification."[4]

The Court of Appeal said the following in *Lavesta Area Group Inc*. v. *Alberta (Energy and Utilities Board):*

> In *Wewaykum Indian Band* at paras. 71-2 the Court held that the circumstances in which an automatic apprehension of bias will arise are very narrow. In general, the law requires some

[4] *Lavesta Area Group, Re*, 2012 ABCA 84 at para 29.

> meaningful indication of a real objective prospect that the decision maker's mind was, consciously or subconsciously, affected by bias. There is no rule that "any degree of earlier participation in a case is cause for automatic disqualification": Wewaykum Indian Band at para. 81. The facts and context are key.[5]

The Court, in looking at the alleged source of bias determined that,

> there is no evidence on this record that [the decision maker] has a closed mind, and that he is not able to fairly consider the matters before him. It is not suggested that there is any animosity between him and the participants in the hearing, nor is there any suggestion of pre-judging. His disqualification must depend on an absolute rule that anybody associated with the prior hearings will be reasonably apprehended to be biased. That is contrary to *Wewaykum Indian Band*.[6]

The regulatory appeal of Prosper's OSE program was assessed pursuant to the *Oil and Gas Conservation Act* and the *Public Lands Act*, while Prosper's Applications have been filed and will be assessed under the *Oil Sands Conservation Act, the Water Act* and the *Environmental Protection and Enhancement Act*. Furthermore, the panel in the regulatory appeal made its decision on the evidence and argument presented in that hearing. Similarly, this panel will make its decision on the Applications based on the evidence filed and arguments made in this proceeding. There is no evidence to suggest otherwise.

The panel is of the view that a reasonable informed person, assessing this matter would find that FMFN has not provided evidence that suggests that somehow Commissioner Macken's mind is closed, or strongly resistant to persuasion, and cannot be swayed by the arguments or evidence that she will hear in the upcoming hearing.

Similarly, the panel finds that a reasonable informed person, viewing the matter realistically and practically and having thought the matter through would not conclude that there is an apprehension of bias present in the circumstances. Furthermore, the reasonable informed person would not conclude that it is more likely than not that Commissioner Macken would decide the Applications unfairly.

Sincerely,

Barbara S. Kapel Holden
Legal Counsel

cc: Robert Kopecky, Melody Nice, ACO
Susan Foisy, Sarabpreet Singh, Toni Hafso, ACO
Meighan Lacasse, AER
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[5] *Ibid* at para 26.
[6] *Lavesta Area Group, Re*, 2012 ABCA 84 at para 28.