Alberta Energy Regulator

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Via Email Only

August 16, 2017

Boughton Law Corporation
Attention: Tarlan Razzaghi and James Coady Q.C.

Osler, Hoskin & Harcourt LLP
Attention: Sander Duncanson

The Minister of Justice and Solicitor General of Alberta
Attention: Doug Titosky, David Sharko and Jamie Speer

Dear Counsel:

Re: Prosper Petroleum Ltd (Prosper) Rigel Project
Applications 1778538, 00370772-001 and 001-341659
Proceeding 350

Introduction

On August 4, 2017 the panel notified the parties of its decision not to grant the request of the Fort McKay First Nation to suspend the hearing process for Prosper Petroleum Ltd.'s (Prosper) applications under the *Oil Sands Conservation Act* (OSCA), *the Water Act* and the *Alberta Environmental Protection and Enhancement Act* (EPEA) for its Rigel Project (Prosper's applications). In the same letter the panel advised that its reasons would follow. The panel's reasons are below.

In the August 4, 2017 letter the panel also notified the parties of its decision to allow Fort McKay First Nation to file an amended Notice of Question of Constitutional Law. The new dates for that process are set out at the end of this letter.

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The Panel's Reasons

The oral hearing of Prosper's applications is scheduled to commence October 17, 2017. In accordance with the hearing schedule established by the panel, Fort McKay First Nation filed a Notice of Question of Constitutional Law on June 22, 2017 (NQCL). The Attorney General for Alberta (Alberta) and Prosper responded on July 18, 2017. Fort McKay First Nation was to file its reply by August 8, 2017. On July 26, 2017 the Supreme Court of Canada rendered decisions in two cases: *Clyde River*[1] and *Chippewas of the Thames*[2]. The panel considered the decisions to be relevant to the NQCL. On July 27, 2017 the panel asked the parties to provide their views about the relevance and impact of the decisions on the NQCL and the NQCL process. The panel set August 3, 2017 as the date for the parties to provide their views and also suspended the August 8th date for Fort McKay First Nation's reply submissions in the NQCL process.

On August 3rd Fort McKay First Nation, Prosper, and Alberta responded to the panel's request. In its submissions Fort McKay First Nation asked the panel to suspend the hearing process for Prosper's applications or, in the alternative, to give reasons for declining to suspend the hearing process and to provide a new schedule to allow Fort McKay First Nation to file an amended NQCL. Fort McKay First Nation said it needed to incorporate its interpretation and application of the *Clyde River* and *Chippewas of the Thames* cases into its submissions on its NQCL. It may also amend the questions it posed in the original NQCL. On August 4th Prosper filed submissions in response to Fort McKay First Nations' request that a new schedule be set to allow Fort McKay First Nation to file an amended NQCL. Prosper did not address Fort McKay First Nation's request that the hearing process be suspended.

The bulk of Fort McKay First Nation's submissions were directed to the implications of the *Clyde River* and *Chippewas of the Thames* decisions for its NQCL. This is not the appropriate time to address Fort McKay First Nation's arguments about consultation and accommodation or the application of those decisions to the circumstances of this proceeding. These reasons focus on whether Fort McKay First Nation made a compelling case for suspending the hearing process.

[1] *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40
[2] *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc., 2017 SCC 41*

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Sections 46 and 44 of the *Alberta Energy Regulator Rules of Practice* (AER Rules) provide that a party may file a written notice of motion asking for an adjournment of a hearing. The notice of motion is to be supported by affidavit evidence. Fort McKay First Nation's request was not made in the form of a notice of motion and no affidavit evidence was filed in support of its request. Prosper and Alberta did not raise any concerns about this. Since the request is clear and since the hearing date is still more than two months away, the panel is of the view that no prejudice arises from the form of the request.

In May of 2016 the Alberta Energy Regulator (AER) suspended processing and consideration of the applications. On November 8, 2017 the AER notified Prosper and Fort McKay First Nation that it would resume processing Prosper's applications. One of the reasons given was that subsection 7 (3) of the *Lower Athabasca Regional Plan Regulatory Details Plan* (*Regulatory Details Plan)* requires the AER to "not adjourn, defer, deny, refuse or reject any application, proceeding or decision making process before it by reason only of … (b) the incompletion" of a sub-regional plan such as the potential Moose Lake Access Management Plan (MLAMP).

Fort McKay First Nation argued in its August 3rd submissions that subsection 10(3) (c) of the OSCA gives the AER the authority to suspend the proceeding. Fort McKay First Nation also said that the proper interpretation of subsection 7(3) of the *Regulatory Details Plan* is that if there are circumstances in addition to or other than those identified in paragraphs (a) and (b) of that subsection then the AER may adjourn (or in this case suspend) the proceedings.

The panel agrees with Fort McKay First Nation's interpretation of the combined effect of subsection 10(3) (c) of the OSCA and subsection 7(3) of the *Regulatory Details Plan*. However, Fort McKay First Nation failed to establish to the panel's satisfaction that there are circumstances other than or in addition to the incomplete status of the MLAMP that would warrant a suspension of the hearing process.

The evidence and submissions before the panel, including the participants' statements of concern, their requests to participate and their submissions filed in the hearing process, clearly demonstrate that negotiation of the MLAMP is ongoing. Fort McKay First Nation and Alberta are at the table. The evidence shows that Prosper, other indigenous communities and other oil sands developers

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are or have also been at the negotiating table. The panel has no way of knowing if or when the MLAMP will be complete, what provisions it may ultimately contain and whether any of those provisions might affect Prosper's applications or be affected by Prosper's applications if approved.

Fort McKay First Nation said that to carry on the hearing process would impair the ability of the promise of MLAMP to be fulfilled. It characterized MLAMP as a "constitutional promise" and as "accommodation".

Alberta has said that it considers the hearing process to form part of its consultation process for Prosper's applications. Alberta has clearly communicated that fact to Fort McKay First Nation. Alberta has asked that the hearing proceed.

The *Clyde River* and *Chippewas of the Thames* decisions of the Supreme Court of Canada reaffirm a number of key principles. The principles relevant to Fort McKay First Nation's request that the hearing process be suspended are that: a hearing process may form part of the Crown's consultation process if the Crown has clearly communicated its intention to the relevant First Nation; and, First Nations have an obligation to engage in the consultation process. In addition, as Fort McKay First Nation, Alberta and Prosper each correctly point out, section 21 of REDA prevents the AER from assessing the adequacy of Crown consultation. Fort McKay First Nation has not persuaded the panel that is should interfere in the consultation process by suspending the AER hearing process.

Fort McKay First Nation also said that continuing with the hearing process may result in non-compensable damage.

The OSCA application for approval of an oil sands recovery scheme is the cornerstone of Prosper's three applications. If approved, Prosper's applications under the *Water Act* and EPEA will only be operationalized if its application under the OSCA is approved. After hearing and considering the evidence and submissions of the parties, the AER may decide to refuse or to grant the OSCA approval. If the decision is to grant the OSCSA approval, it is too early to know what conditions would be attached beyond any standard terms and conditions. In addition, and in any

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event, according to subsection 10(3) of the OSCA, if the AER finds it in the public interest to do so, it may only grant Prosper's application for approval of an oil sands recovery scheme with the prior authorization of the Lieutenant Governor in Council. Fort McKay First Nation's submissions about possible harm that may result from the hearing proceeding are purely speculative and premature at this point.

For all of these reasons, the panel decided not to exercise its discretion to suspend the hearing process.

NQCL Process

In its August 4, 2017 letter Prosper objected strongly to Fort McKay First Nation's request to be allowed to amend its NQCL. Prosper argued that it would be "unfair, inefficient and prejudicial to Prosper". Prosper said that now Fort McKay First Nation has seen its submissions and those of Alberta, Fort McKay First Nation will have an unfair advantage. Prosper also said that an amended NQCL will also result in extra time and resources being directed to the NQCL.

The rules and regulations that explicitly deal with notices of questions of constitutional law in AER proceedings are silent on whether a notice of question of constitutional law, once filed, may be amended. Those rules and regulations are section 10 of the AER *Rules of Practice*, section 12 of the *Administrative Procedures and Jurisdiction Act* and the *Designation of Constitutional Decision Makers Regulation*. In this case, the panel is of the view that the process described in its letter of August 4th, 2017 for dealing with an amendment to Fort McKay First Nation's NQCL effectively addresses Prosper's concerns with respect to fairness, efficiency and prejudice. Prosper and Alberta will have the opportunity to respond fully to whatever amendments and accompanying submissions Fort McKay First Nation may make. Concerns about efficiency and impact on the hearing process are factors that may be taken into account in an application for costs. Finally, the timeline the panel has established does not result in a delay of the oral hearing.

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Revised dates for the NQCL process are as follows:

Fort McKay First Nation to file amended NQCL, if any	August 30, 2017
Prosper and Alberta Response	September 13, 2017
Fort McKay First Nation Reply, if any	September 20, 2017

Signed this 16th day of August, 2017 on behalf of the panel,

Cecilia A. Low
AER Hearing Commissioner – Presiding

cc: Meghan Conroy, MLT Aikins LLP
Mark Gustafson, JFK Law
Robert Kopecky, Charlene Richards, Vince Biamonte, ACO
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