Alberta Energy Regulator

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Via Email Only

October 16, 2017

The Minister of Justice and Solicitor General of Alberta
Attention: Doug Titosky

Osler, Hoskin & Harcourt LLP
Attention: Sander Duncanson

Boughton Law Corporation
Attention: Tarlan Razzaghi

Dear Sir/Madam:

Re: Amended Notice of Question of Constitutional Law
Prosper Petroleum Ltd. (Prosper) Rigel Project
Proceeding ID 350

Introduction

On June 22, 2017, Fort McKay First Nation filed a Notice of Question of Constitutional Law (NQCL or Notice) pursuant to the *Administrative Procedures and Jurisdiction Act* (APJA). This Notice was served on Prosper, the Minister of Justice and Solicitor General of Alberta (Alberta) and the Attorney General of Canada. Prosper and Alberta each filed with the Alberta Energy Regulator (AER) submissions in response to the NQCL. Fort McKay First Nation was entitled to file a reply to Prosper's and Alberta's submissions. However, prior to the date on which that reply was due, the panel wrote to the parties suspending the date for Fort McKay's reply and asking the parties to provide any comment they might have regarding the relevance of two recent Supreme Court of Canada decisions, *Clyde River v. Petroleum Geo-Services Inc.* and *Chippewas of the Thames First Nations v. Enbridge Pipelines Inc,* [1] to the matters raised in the NQCL. In its response to the Panel's request for comment, Fort McKay First Nation asked that it be permitted to file an amended NQCL. That request was granted and in accordance with a schedule established by the hearing panel on August 16, 2017, Fort McKay First Nation filed an amended Notice of Question of Constitutional Law on August 30, 2017. Prosper and Alberta responded in writing on September 13, 2017, and Fort McKay First Nation filed a reply on September 20, 2017. Mikisew Cree First Nation also filed submissions in response to the NQCL but has since withdrawn from the proceeding.

[1] *Clyde River v. Petroleum Geo-Services Inc.*, 2017 SCC 40 and *Chippewas of the Thames First Nations v. Enbridge Pipelines Inc.*, 2017 SCC41.

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The panel has decided that since Fort McKay First Nation did not satisfy the notice requirements of the APJA and it did not raise questions of constitutional law that fall within the AER's jurisdiction, the panel cannot consider the questions and it cannot refer them to court.

These are the panel's reasons.

AER's jurisdiction to hear constitutional questions

The APJA and its *Designated Decision Maker Regulation* (DMR) govern the ability of the AER to consider questions of constitutional law. The APJA defines questions of constitutional law in section 10(d). If someone plans to raise a "question of constitutional law" as defined in the APJA then they must meet the specified requirements for notice set out in the DMR. The requirements are strict and compliance is mandatory.

> 10. (d) "question of constitutional law" means
>
> (i) any challenge, by virtue of the Constitution of Canada or the *Alberta Bill of Rights*, to the applicability or validity of an enactment of the Parliament of Canada or an enactment of the Legislature of Alberta, or
>
> (ii) a determination of any right under the Constitution of Canada or the *Alberta Bill of Rights*.
>
> 12 (1) Except in circumstances where only the exclusion of evidence is sought under the *Canadian Charter of Rights and Freedoms*, a person who intends to raise a question of constitutional law at a proceeding before a designated decision maker that has jurisdiction to determine such a question
>
> (a) must provide written notice of the person's intention to do so at least 14 days before the date of the proceeding
>
> (i) to the Attorney General of Canada,
>
> (ii) to the Minister of Justice and Solicitor General of Alberta, and
>
> (iii) to the parties to the proceeding,
>
> and
>
> (b) must provide written notice of the person's intention to do so to the designated decision maker.
>
> **(2)** Until subsection (1) is complied with, the decision maker must not begin the determination of the question of constitutional law.
>
> **(3)** Nothing in this section affects the power of a decision maker to make any interim order, decision, directive or declaration it considers necessary pending the final determination of any matter before it.
>
> **(4)** The notice under subsection (1) must be in the form and contain the information provided for in the regulations.

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The notice requirements ensure that any challenge to an enactment is brought to the attention of the branch of government which is responsible for that legislation so that it has a full opportunity to support the constitutional validity of their legislation, or to defend its action or inaction.[2] The strict notice requirements also ensure that the decision maker has a clear understanding of what it is being asked to answer and that parties to the relevant proceeding and the federal and provincial governments can make an informed decision about whether to and how they should respond.

A further purpose of the requirements of the APJA and the DMR is to ensure that questions of constitutional law are considered within a clearly defined factual matrix where the questions and facts fall within the jurisdiction of the decision maker and necessarily arise from a matter before them.[3]

Parties' Submissions

Fort McKay First Nation opens its notice with a lengthy preamble which describes defects in the Crown's consultation processes which Fort McKay First Nation says are relevant to Prosper's application. Fort McKay First Nation goes on to state that the relief it intends to seek is to have the AER "form the opinion that the Court of Queen's Bench of Alberta is a more appropriate forum to decide the Questions". Fort McKay First Nation's submissions describe what it calls the constitutional order of decision making. They deal extensively with the adequacy of consultation and with policy based limitations on consultation and allege many defects in the relevant regulatory structure that it says prevent meaningful consultation in the context of this proceeding. Fort McKay First Nation says the relief sought is "specific to the factual context of Fort McKay First Nation". Fort McKay First Nation also argues that it must receive accommodation for the historical activity before the hearing in this proceeding can take place.

Alberta says the AER does not have jurisdiction to consider Fort McKay First Nation's amended NQCL. This is because the NQCL is defective in that it is vague, provides inadequate notice, does not ask the AER to answer a question and is an attempt to have the AER find the Crown's consultation with Fort McKay First Nation regarding Prosper's Rigel project to be inadequate. Alberta says that because the AER does not have jurisdiction in regard to the NQCL, it has no ability to send the purported questions of constitutional law to the Court.

Prosper's position at its core is that what Fort McKay First Nation really seeks with its NQCL is a suspension of the proceeding because the Crown's consultation with Fort McKay First Nation is not adequate and accommodations have not yet been provided regarding Rigel. However, Prosper says the AER has no jurisdiction to assess Crown consultation adequacy and therefore has no jurisdiction to deal with the NQCL. Prosper also says that the NQCL is an attempt to have the

[2] See the procedural safeguards afforded to the government in s. 14 of the APJA.
[3] *Pembina Pipeline Corporation,* Applications No. 1806873 etc. Notice of Questions of Constitutional Law, October 22, 2015 Decision Letter; *R v Conway,* 2010 SCC 22 at paragraph 81; *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council,* 2010 SCJ No 43 at paragraph 69.

AER address matters unrelated to Prosper's project or to reconsider and change the regulatory regime applicable to energy projects in Alberta.

What the panel has to decide

Before a designated decision maker can consider whether to exercise the discretion to refer questions of constitutional law to the Court pursuant to section 13 of the APJA, three threshold criteria must be satisfied:

> i) the notice requirements of the APJA must be met;
>
> ii) the notice must describe questions of constitutional law that conform to the definition of "question of constitutional law" in the APJA; and
>
> iii) the questions must fall within the jurisdiction of the AER given the factual and legal context of the proceeding in which the notice is filed.

If any one of the three threshold criteria is not satisfied then the AER may not deal with the questions, either by deciding them or referring them to court. The panel has concluded that the first and third threshold criteria have not been met.

Were the notice requirements of the APJA met?

No Relief is Sought or Specified

Section 12(4) of the APJA requires that the Notice contain the information prescribed in the DMR. The detailed requirements of the information and form of notice are prescribed in Schedule 2 of the DMR and include the requirement that the Notice indicate the relief sought.

The relief sought is a key element of notice. The decision maker must have jurisdiction over the relief sought and the relief must be described with enough particularity so the decision maker to whom notice is given and the Crowns can make informed decisions about potential consequences and how to proceed. The relief which is required to be described in a NQCL must be relief that flows from the answers to the constitutional questions posed: for example, reading down legislation or injunctive relief.

All the Notice says in the request for relief is that:

> the AER form the opinion that the Court of Queen's Bench of Alberta is a more appropriate forum to decide the questions.

The Notice also identifies the two mechanisms for referral set out in section 13 of the APJA and asks that the AER suspend its consideration of Prosper's applications. Finally, the conclusion of Fort McKay First Nation's request for relief is to ask that the AER provide the court with any record or documentation that may assist the court.

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The panel finds that Fort McKay First Nation is not seeking relief in its NQCL as required by the APJA and DMR. Relief is remedial or declaratory. The relief sought in the NQCL is neither remedial nor declaratory. Assuming that what Fort McKay First Nation has described in its Notice are questions, the relief described does not flow from answers to those questions: it is a means to get answers to questions from a different decision maker.

Fort McKay First Nation is not providing notice of constitutional questions it is asking the panel to answer. It is making application to the AER to send constitutional questions to the Court so that "it may seek to consolidate this referral with the judicial reviews it has filed such that all of the issues in this proceeding can be efficiently resolved via a single judicial process".

Prosper points out that the alleged inadequacies in the Crown's consultation process are being considered in the judicial review applications Fort McKay First Nation has before the Court of Queen's Bench. Prosper then argues that the request to suspend this proceeding until the Crown has satisfied its obligations to Fort McKay First Nation is a collateral attack on that process.

This panel has no jurisdiction outside the confines of the APJA to send a matter to the Court for determination. Under the APJA, referral to Court is a discretion a designated decision maker may exercise when it receives proper notice of "constitutional questions" that fall within the decision maker's jurisdiction. To refer the questions to the Court in the present situation would be an abuse of the NQCL process.

Fort McKay First Nation's NQCL leaves this panel, the Crown and Prosper wondering what relief Fort McKay First Nation wants to flow from the answers to the questions raised in its NQCL. It might be possible to infer what result Fort McKay First Nation wants from the answers to these questions, but it is not appropriate to do that. Without a clear and precise statement of the relief requested from the answering of the questions, the NQCL is defective.

For these reasons, the panel finds that Fort McKay First Nation's Notice is deficient because it does not specify what relief Fort McKay First Nation seeks.

Must the Notice Pose a Question to the Decision Maker?

The wording of sections 12 and 13 of the APJA make it clear that the core of the notice of question of constitutional law must be a request to have the decision maker answer a question or questions. The question(s) must arise from the facts of the matter before the decision maker and must fall within that decision maker's jurisdiction. The questions must be about the applicability or validity of an enactment or about the existence, scope and/or contours of a constitutional right.

Fort McKay First Nation asserts in its reply submission that it is not required to pose a question to the AER in order to have the AER refer the matters described in its Notice to Court. However Fort McKay First Nation cites no authority for this proposition.

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Section 12(1) of the APJA states that notice must be given of a person's intention to raise a question of constitutional law "before a designated decision maker that has jurisdiction to determine such a question" [emphasis added]. However, here the AER is not being asked to answer a question of constitutional law as intended by the APJA. Fort McKay First Nation is merely applying to have the issues it raises sent to the Court of Queen's Bench for the Court to determine. Making that application is not raising a question of constitutional law with the panel as intended by the APJA.

In addition, section 12(2) says that the "decision maker must not begin the determination of the question…" [emphasis added] until the notice provision has been complied with. That provision clearly contemplates that the notice poses a question that the designated decision-maker will be asked to answer in the context of the application(s) that are the subject of the proceeding in which the notice is filed.

The wording of section 13 of the APJA also makes it clear that the notice must describe a question that the designated decision maker may decide. Specifically:

> if the designated decision maker is of the opinion that the court is a more appropriate forum to decide the question, the designated decision maker may, instead of deciding the question.[emphasis added]

For the above reasons the panel finds that the Notice is deficient because it does not describe a question for the AER to decide.

Has Fort McKay First Nation Posed "Questions of Constitutional Law"?

The "Questions" portion of Fort McKay First Nation's notice is appended to these reasons.

Alberta says that Fort McKay First Nation has not clearly stated any questions of constitutional law. Alberta points to the phrases "constitutionally protected procedural rights" and "constitutionally protected procedural fairness rights" as examples of the lack of particularity in the stated questions. Alberta says it should not have to guess what is being challenged and the basis of the challenge. Prosper also says that Fort McKay First Nation's submissions are not clearly linked to the questions set out in the NQCL and it is left to guess what is being challenged and on what basis. The panel agrees. In the panel's view, the wording of what Fort McKay First Nation identifies as its first four questions lacks both clarity and precision. Its submissions do not provide clarity.

Alberta says that questions 1 (f) (i) – (iv) do not ask for a right to be determined but assume or are premised on a right as stated in the question. With regard to question 1(f)(i), Alberta notes that Fort McKay First Nation asks whether its rights are breached if the panel considers the *Oil Sands Conservation Act* application. Alberta says that determining if a right is breached is not

"determining" a right. The panel agrees that determining a right is determining if the right as described exists. That is not what questions 1(f) (i) – (iv) ask.

As a result, the panel concludes that questions 1(f) (i) – (iv) are not "questions of constitutional law".

Questions 2(a) and (b) are more precise and on their face may raise challenges to the applicability of enactments of the provincial legislature. However, in light of the conclusion the panel has reached on the first and third threshold criteria, it is not necessary to consider this point further.

Do the Questions Fall within the Jurisdiction of the AER?

The AER is a creature of statute and only has powers granted to it by the legislature.[4] Pursuant to section 20 of the *Responsible Energy Development Act* (REDA), the AER is required to act consistently with the *Alberta Land Stewardship Act* (ALSA) and any regional plans, including the Lower Athabasca Regional Plan (LARP). In addition, the AER is prohibited by section 21 of REDA from assessing the adequacy of Crown consultation.

Both Alberta and Prosper make the point that all of the questions set out in the Notice are really about the adequacy of Crown consultation. The panel agrees in particular with Prosper's submission where it says:

> It is evident from the entirety of the NQCL that FMFN takes issue with the adequacy of the Crown's consultation and accommodation in relation to the impacts on FMFN from industrial development in general.[5]

The preamble in Fort McKay First Nation's Notice makes it clear that its questions are rooted in its concern with the adequacy of Crown consultation. More specifically, the preamble and its submissions[6] make clear that the real concern is with the adequacy of the process that resulted in the LARP and with the substance of the LARP itself. It is also clear that Fort McKay First Nation is concerned with the process that is anticipated to result in the Moose Lake Access Management Plan (MLAMP), which is expected to be a LARP regional sub-plan. In addition, each one of questions 1 (f) (i) – (iv) squarely raises the issue of the adequacy of Crown consultation. As a result, the panel concludes that questions 1 (f) (i) – (iv) do not fall within AER jurisdiction.

Similarly, the preamble, submissions and the specific reference to "the context of the case" as the lead-in to questions 2(a) and (b) lead the panel to conclude that those questions are also beyond

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[4] *R. v. Conway, supra* and *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, supra*
[5] Prosper's September 13th, 2017 submissions in response to Fort McKay First Nation's NQCL at para. 19.
[6] See for example: Preamble paragraph 1(e) "Whereas the scope of the ACO consultation process and the AER process exclude consideration of Alberta's failure to meaningfully protect the Moose Lake Area via satisfaction in a timely way of an Accommodation given to Fort McKay First Nation by the Alberta Crown"; pages 53 – 54 which set out submissions about the inadequacy of the LARP process; and the Affidavit of Karla Buffalo.

its purview. The questions deal with the adequacy of Crown consultation and not just in regard to the applications before the panel. Fort McKay First Nation says the impugned legislation is not applicable because of contraventions of its right to be consulted and accommodated by the Crown. To decide if that proposition is correct, the panel would have to assess the adequacy of consultation. It cannot do that. As a result, if the Notice raises questions of constitutional law they do not fall within the jurisdiction of the AER and so the panel cannot consider them.

Conclusion

The panel finds that the notice requirements in the APJA have not been met and that the matters raised by the Notice do not fall within the AER's jurisdiction. Because all of the threshold criteria must be met in order for the AER to consider a question of constitutional law and whether to refer it to Court, and because the panel has found that two of the notice criteria have not been met, that is sufficient to dispose of this matter.

The panel

<original signed by>

Cecilia A. Low, presiding Hearing Commissioner

<original signed by>

Christine Macken, Hearing Commissioner

<original signed by>

Terry Engen, Hearing Commissioner

cc: Bruce Hughson, Attorney General of Canada, General Counsel, Prairie Region
Meagan Conroy, Fort McKay Metis Community Counsel
Robert Kopecky, Charlene Richards, Toni Hafso, Vince Biamonte, ACO
Susan Foisy, Sarabpreet Singh, ACO
Meighan LaCasse, Barbara Kapel Holden, Tara Wheaton AER

Amended Notice of Question of Constitutional Law

To: The Minister of Justice and Solicitor General of Alberta

To: The Attorney General of Canada

AND

To: Alberta Energy Regulator

To: Mikisew Cree First Nation

To: Prosper Petroleum Ltd.

To: Fort McKay Métis Community Association

From: Fort McKay First Nation

Lawyer for Fort McKay First Nation:

Boughton Law Corporation

Attention: James Coady, Q.C.
Tarlan Razzaghi

Date of hearing: October 17, 2017

Fort McKay First Nation intends to raise the following Questions of Constitutional Law.

Attached are the details of Fort McKay First Nation's argument:

Questions:

1. Pursuant to section 10(d)(ii) of the *Administrative Procedures and Jurisdiction Act*, RSA 2000, c A-3:

    a. Whereas the sector specific consultation matrices in *The Government of*

Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management, July 28, 2014, describe "In-situ projects with associated facilities and access" as having "high impact", the Rigel Project is an In-situ project of this kind, and Alberta's Aboriginal Consultation Office has assessed the consultation obligations for the Rigel Project as the highest possible on the matrices;

b. Whereas the Rigel Project, as an In-situ project with associated facilities and access, is authorized by approval under the *Oil Sands Conservation Act*;

c. Whereas the ACO has advised Fort McKay First Nation that "the Government of Alberta does not require consultation for approvals under the *Oil Sands Conservation Act*. The Alberta Energy Regulator ["**AER**"] process remains the proper venue for concerns relating to approvals under this *Act*"; and

d. Whereas the Supreme Court of Canada decisions in *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.* and *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.* establish that Fort McKay First Nation has a right to meaningful Aboriginal consultation and accommodation which must precede the AER's regulatory decision making as a constitutional imperative, and that satisfaction of this obligation is a special public interest that supersedes other concerns typically considered by the AER;

e. Whereas the scope of the ACO consultation process and the AER process exclude consideration of Alberta's failure to meaningfully protect the Moose Lake Area via satisfaction in a timely way of an Accommodation given to Fort McKay First Nation by the Alberta Crown;

f. Therefore:

(i) Whether Fort McKay First Nation's right to meaningful Aboriginal consultation and accommodation as a constitutional imperative would be breached if the AER were to consider the *Oil Sands Conservation Act* application without any Aboriginal consultation by Alberta in relation to that application;

(ii) Whether the AER's statutory authorities and powers enable the AER to satisfy Fort McKay First Nation's right to meaningful Aboriginal consultation and accommodation as a constitutional imperative;

(iii) Whether the constitutionally protected procedural rights enjoyed by Fort McKay First Nation are such that, in the absence of the consent of Fort McKay First Nation, the AER has no power or jurisdiction to proceed to hearing prior to implementation of the protections inherent to a constitutionally binding Accommodation extended to Fort McKay by the Alberta Crown; and/or

(iv) Whether, if the AER Hearing Panel were to proceed to conduct its hearing, the AER Hearing Panel would breach Fort McKay's constitutionally protected procedural rights to Accommodation which advances reconciliation in accordance with the Honour of the Crown.

2. Pursuant to section 10(d)(i) of the *Administrative Procedures and Jurisdiction Act*, RSA 2000, c A-3, whether any of the following are inoperable and/or inapplicable in the context of the case:

a. section 15 of the *Alberta Land Stewardship Act*, SA 2009, c. A-26., and Part 1, s. 7(3), of the *Regulatory Details Plan* in the *Lower Athabasca Regional Plan*; and/or

b. sections 20(1) and 21 of the *Responsible Energy Development Act*, and/or *Energy Ministerial Order 105/2014* and *Environment and Sustainable Resource Development Ministerial Order 53/2014* and the *Joint Operating Procedures for First Nations Consultation on Energy Resource Activities June 10, 2015*.

Fort McKay First Nation intends to seek the following relief:

First, pursuant to section 13(1) of the *Administrative Procedures and Jurisdiction Act*:

i. that the AER form the opinion that the Court of Queen's Bench of Alberta is a more appropriate forum to decide the Questions;

ii. that the Alberta Energy Regulator, instead of deciding the questions:

1. direct Fort McKay First Nation to apply to the Court to have the questions determined by that Court; or alternatively

2. state the said question of constitutional law in the form of a special case to the Court for the opinion of the Court;

Second, that the Alberta Energy Regulator suspend proceedings involving Application Nos. 1778538, 00370772-001 and 001-341659 until the decision of the Court has been given; and

Third, that the Alberta Energy Regulator provide the Court with any record and documentation that may assist the Court in determining the question of constitutional law submitted to it under this section.