By e-mail only

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November 20, 2023

Dear Parties:

First Peoples Law LLP

Attention: Tyler Swan
Caitlin Stockwell

Bennett Jones LLP

Attention: Martin Ignasiak
Logan Lazurko

RE: Stay Request filed by Fort McMurray 468 First Nation
AdhMor Ltd.
Application Nos.: 1943203 & 32443152
Request for Regulatory Appeal No.: 1948977

The Alberta Energy Regulator (**AER**) has considered the October 20, 2023, request of Fort McMurray 468 First Nation (**FM468FN**), under section 39(2) of the *Responsible Energy Development Act* (***REDA***) for a stay of the AER's September 21, 2023 decision (the **Decision**) to AdhMor Ltd. (**AdhMor**), to approve application nos. 1943203 & 32443152 (the **Approvals**). The Decision is the subject of the above-noted request for regulatory appeal, also filed by FM468FN on October 20, 2023.

For the reasons that follow, the AER denies FM468FN's request for a stay of the Approvals.

REASONS FOR DECISION

Under section 38(2) of *REDA*, the filing of a request for regulatory appeal does not operate to stay an appealable decision. The AER may, however, grant a stay on the request of a party to the regulatory appeal under section 39(2). It states:

> The Regulator may, on the request of a party to a regulatory appeal, stay the appealable decision or part of it on any terms or conditions that the Regulator determines.

The AER's test for a stay is adopted from the Supreme Court of Canada's decision in *RJR MacDonald*.[1] The three parts of the test are:

[1] *RJR MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 (*RJR MacDonald*).

1. Serious Question to be Tried – Is there a serious question to be heard at the requested appeal? This requires a preliminary assessment of the merits of the requested appeal.

2. Irreparable Harm – Will the stay applicant suffer irreparable harm if the stay request is refused?

3. Balance of Inconvenience – Which of the parties would suffer greater harm from the grant or refusal of the requested stay?[2]

The *RJR MacDonald* decision makes it clear that the onus is on the stay applicant, in this case FM468FN, to satisfy the AER that it has satisfied each element of the three-part test.

1. Serious Question to be Tried

The first part of the *RJR MacDonald* test requires the stay applicant to establish that there is a serious meritorious issue to be tried. The applicant must demonstrate that there is some basis on which to present an argument on the requested appeal. This is a relatively low threshold.[3] The stay applicant need only show that the requested appeal is not frivolous or vexatious.[4]

FM468FN has submitted that its claims are neither frivolous nor vexatious. The FM468FN is asserting, on behalf of its members, infringement of their constitutional and treaty rights and submits that it has concerns about procedural fairness and the honour of the Crown. FM468FN submits that the Approvals are within 8 km of the Gregoire Lake 176 Reserve, which is the largest of FM468FN's four reserves.

The AER finds that FM468FN's claims are neither frivolous nor vexatious. Given the low threshold for this part of the three-part test, the AER is satisfied that FM468FN has raised a serious question to be tried.

On this basis, the first part of the *RJR MacDonald* test has been met. This conclusion in no way predetermines the disposition of the request for regulatory appeal or the issues that would be the subject of a hearing on the regulatory appeal should it be granted.

2. Irreparable Harm

The second part of the *RJR MacDonald* test requires the stay applicant to establish that they will suffer irreparable harm if the stay is not granted. Irreparable harm will occur if the stay applicant will be adversely affected by the approval ahead of the regulatory appeal and if this harm cannot be remedied later if the regulatory appeal is successful. It is the nature of the harm and not its magnitude that is

[2] *RJR MacDonald*, *supra* note 1 at para 48.
[3] *RJR MacDonald*, *supra* note 1 at para 67.
[4] *RJR MacDonald*, *supra* note 1 at para 49.

considered.[5] The harm must be of the sort that cannot be remedied through damages (i.e., monetary terms) or otherwise cured.[6] As noted by the Alberta Court of Appeal, irreparable harm is "of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the [stay] would be a denial of justice."[7]

The Federal Court of Canada has described the onus that rests upon the stay applicant to meet the irreparable harm test as follows:

> The burden is on the party seeking the stay to adduce clear and non-speculative evidence that irreparable harm will follow if their motion is denied […]
>
> That is, it will not be enough for a party seeking a stay to show that irreparable harm *may arguably result* if the stay is not granted, and allegations of harm that are merely hypothetical will not suffice. Rather, the burden is on the party seeking the stay to show that irreparable harm *will result* […][8] [emphasis in original]

FM468FN submits its members' constitutional and treaty rights are being infringed and that "construction of the waste management facility will directly impact the lands and waters upon which FM468FN relies to support and sustain its cultural, spiritual, and traditional practices. These impacts cannot be cured by an award of damages." FM468FN also states, "FM468FN's relationship with the land cannot be understated; the land is at the core of their culture and way of life. No amount of money can compensate for this loss."

FM468FN submits that FM468FN's Statements of Concern identify how the Approvals will affect its members' traditional practices. FM468FN also submits that there are 149 Traditional Use sites (including berry picking areas, game hunting, bird harvesting, medicinal plants, trail, trapping areas and traplines) within a 5 km radius identified in FM468FN's Community Knowledge Keeper.

FM468FN has not included the Community Knowledge Keeper data in its materials so it is impossible to determine the location of these Traditional Use sites, or the types of activities conducted at these sites with any specificity.

Upon review of the Statements of Concern, FM468FN submits that 1) the Approvals are located within 8 km of the Gregoire Lake 176 Reserve; 2) the Approvals are in close proximity to permanent water bodies (with a photo included); and 3) the Approvals are within FM468FN's 10 km moratorium zone.

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[5] *RJR MacDonald*, *supra* note 1 at para 64.
[6] *RJR MacDonald*, *supra* note 1 at para 64.
[7] *Lubicon Lake Band v Norcen Energy Resources Ltd*, 1985 ABCA 12 at paras 30, citing *High on The Law of Injunction*, 4th ed, vol 1 at 36.
[8] *Canada (Attorney General) v Amnesty International Canada*, 2009 FC 426 at paras 29-30.

It appears to be uncontested evidence that the Approvals are within 8 km of the Gregoire Lake 176 Reserve and this is accepted as fact.

While FM468FN has included a photo of the Approvals being in close proximity to some water bodies, FM468FN has not submitted any evidence that its members use any of these water bodies.

Based on FM468FN's submissions, the 10 km moratorium is "an interim measure until enforceable measures are in place to address and manage cumulative impacts on [FM486FN's] Treaty 8 rights" and is not currently enforceable. The FM468FN has not submitted the text of the moratorium. The allegation of a moratorium provides no evidence demonstrating traditional uses or exercises of constitutional or treaty rights that are affected by the Approvals.

The information provided by FM468FN does not identify specific locations where traditional use activities occur within or proximate to where the Approvals are located, or that a member's use of natural resources may be impacted by the Approvals in a way that would result in irreparable harm.

It appears that AdhMor's submissions that the site of the Approvals was previously disturbed and is within the twinned lanes of a busy highway are uncontested. This further makes it unclear what uses would be disturbed thus resulting in irreparable harm.

While the Approvals being within 8 km of the Gregoire Lake 176 reserve does show some degree of proximity, the lack of any specific evidence of locations of traditional use activities or exercises of the asserted rights does not allow the AER to conclude that the FM468FN will suffer irreparable harm if the stay is not granted. As stated by the Federal Court of Canada, "The burden is on the party seeking the stay to adduce clear and non-speculative evidence that irreparable harm will follow if their motion is denied".[9]

The AER finds that FM468FN has not provided evidence sufficient to demonstrate that there will be irreparable harm if the stay is denied. As a result, the FM468FN has failed to meet the second part of the *RJR MacDonald* test.

3. Balance of Inconvenience

The balance of inconvenience involves examining which party will suffer more harm from the granting or refusal of the stay. The AER must weigh the burden imposed on AdhMor if the stay is granted against the harm to FM468FN if the stay is refused.

FM468FN has not included any evidence of their members' traditional use activities or where members assert their constitutional and treaty rights outside of a general radius and it is unclear what harm

[9] *Canada (Attorney General) v Amnesty International Canada*, 2009 FC 426 at para 29.

FM468FN members would experience if the stay is refused. AdhMor has submitted that it will suffer harm if the stay is granted because the Approvals are close to construction completion and AdhMor has already made significant investments in time and resources to the Approvals.

The AER finds that the balance of inconvenience favours denying the stay request. As a result, FM468FN has failed to meet the third part of the *RJR MacDonald* test.

CONCLUSION

For the foregoing reasons, the AER finds that FM468FN has failed to demonstrate irreparable harm if a stay is not granted and the balance of inconvenience favours denying the stay. Accordingly, FM468FN has not met the *RJR MacDonald* test for a stay and the AER has decided to deny the request for a stay in accordance with Section 39(2) of *REDA*.

The AER will provide further direction to the Parties regarding next steps for the request for regulatory appeal in due course.

Sincerely,

<Original signed by>

Paul Ferensowicz
Principal, Regulatory Advisor

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