

January 14, 2020

By email only

Boughton Law Corporation
Attention: James Coady Q.C.

Osler, Hoskin & Harcourt LLP
Attention: Sander Duncanson

JFK Law
Attention: Robin Dean

Alberta Environment and Parks
Attention: Lisa Sadownik

Dear Sirs/Madams:

Re: Proceeding ID 350
Prosper Petroleum Ltd (Prosper) Rigel Project (the “Rigel Project”)
Panel decision Fort McKay First Nation’s request to reconsider its decision on scope

On December 18th, 2020 Fort McKay First Nation asked the panel to reconsider its December 2nd, 2020 decision on the scope of the redetermination (the scoping decision). In the scoping decision, we decided the scope of the redetermination is:

Whether Prosper’s application under s.10 of the *Oil Sands Conservation Act* for the Rigel Project is in the public interest after considering:

- i) Whether the Moose Lake Access Management Plan process triggered the Honour of the Crown; and
- ii) If the answer to i) is yes, would it be consistent with the Honour of the Crown to approve, deny or delay approval of the Rigel Project?

Fort McKay First Nation asserts that two issues should be added to the scope: (i) Prosper’s ability to develop the Rigel Project, given what Fort McKay First Nation says is Prosper’s precarious financial

situation; and (ii) the economic benefits of the Rigel Project. Additionally, Fort McKay First Nation requested that they be allowed to file evidence to support their case for including the two additional issues in the redetermination.

Panel's Decision and Reasons

The panel denies Fort McKay First Nation's request for a reconsideration of its scoping decision.

Our decision is based first, on our interpretation of the direction we received from the Court of Appeal and second, on our finding that Fort McKay First Nation has not demonstrated that the issues ought to be revisited.

First - as we noted in the scoping decision, the Court of Appeal found the panel's 2018 analysis of the public interest to be deficient in just one area – its failure to consider the Moose Lake Access Management Plan (MLAMP) process and the Honour of the Crown. Prosper's financial viability and the expected economic benefits of the Rigel Project do not fall within the scope of the redetermination as described by the Court of Appeal. The two issues that Fort McKay First Nation seeks to add have no bearing on the MLAMP and the Honour of the Crown.

Second - on October 9th, 2020 the panel wrote to the parties inviting their input on several procedural issues. In that letter we also put forward our interpretation of the question to be decided in the redetermination. We informed the parties that if they wished to comment they should do so by October 26th, 2020.

Fort McKay First Nation responded on October 26th, 2020. They submitted that since the original decision was vacated by the Court of Appeal, the scope of the redetermination was wide open and not limited to the MLAMP process. They also said they should be allowed to bring new evidence on all issues relevant to the public interest.

In its December 18th, 2020 letter Fort McKay First Nation said:

We request the Panel reconsider their decision based on either a misapprehension of our submission or a breach of procedural fairness and allow Fort McKay First Nation ("Fort McKay") to file its evidence regarding the new facts which are the basis for our original request to include in the scope of the hearing these 2 issues: that "Prosper is not likely able to develop the Rigel Project and that the project will not bring the significant economic benefits that the Panel believed to be the case in its initial decision". (Letter of October 26th). We provided one affidavit of Mr. Gardiner to indicate that there was credible evidence on the first issue; the viability of Prosper Petroleum Ltd. ("Prosper") as a going concern was irreparably harmed and we indicated

that we would be filing an expert report on the significant negative change in the long-term economic benefit of Prosper's Rigel Project (the "Project") since the Panel's decision of June 2018.

Fort McKay First Nation also argued it would be a breach of procedural fairness should they not be allowed to file evidence about new facts they say supports their request to have the two issues described above added to the redetermination.

Prosper's eligibility to hold an approval

Fort McKay First Nation's December 18th, 2020 letter clarifies the first issue they want added to the scope of the redetermination. Reading their request for reconsideration letter in light of their October 26th letter, we understand Fort McKay First Nation to be saying that, in addition to questioning whether Prosper is financially able to develop the Rigel Project in fact, Fort McKay First Nation also questions Prosper's eligibility in law to hold an approval. They cited from the preamble to Directive 076 and argued that it is not in the public interest to issue approvals to proponents on the verge of financial collapse.

On the matter of Prosper's ability to hold an approval, the AER's public records show that Prosper holds a Business Associate code issued by the AER. On that basis Prosper is eligible to apply for and hold AER approvals/licences. No suggestion was made or evidence provided by Fort McKay First Nation that Prosper's eligibility to hold such approvals/licences has been lost or limited by the AER since the panel's original decision was issued. We also find that there is nothing in the evidence provided by Fort McKay First Nation to support the argument that Prosper is on the verge of financial collapse.

The panel has re-read Mr. Gardiner's affidavit filed by Fort McKay First Nation in support of its October 26th submissions on the scope of the redetermination. He said the Rigel project 'may not proceed by reason of the unprecedented and inordinate delay' in obtaining a decision and as a consequence 'the health of Prosper as a going concern has been compromised'. [paragraph 9]. Further in his affidavit Mr. Gardiner says that for each year the Rigel project is delayed Prosper loses \$48.4 million in annual profits and that millions of dollars in royalties and taxes, as well as hundreds of jobs, are foregone. [paragraph 55]

Mr. Gardiner's statements lead us to conclude that should the Rigel Project be approved, it *may not* proceed and that the company is experiencing difficulties because of delays. But this is not evidence of insolvency. It is also not evidence of the prospects of Prosper and its partner securing financing if and when necessary. Finally, we find no evidence in the Gardiner affidavit that, if it were to receive approval pursuant to section 10 of *OSCA* for the Rigel Project scheme and it were to choose to proceed with the

Rigel Project, Prosper would not be able to meet its various obligations in the approval and applicable regulatory framework.

Economic Benefits

In its 2018 decision the panel found that the Rigel Project would have substantial economic benefits for a project of its size and that the balance between potential negative impacts and overall economic benefits was more or less even. Fort McKay First Nation says that, since 2018, the economic prospects of the Rigel Project have drastically worsened and potential benefits in both taxes and royalties have drastically decreased. They conclude that this reduction in economic benefits “may well tip this precarious balance in the opposite direction” such that the Rigel Project is no longer in the public interest.

Fort McKay First Nation argued changes in broader economic circumstances mean the economic benefits of the Rigel Project should be reconsidered. They did not provide evidence to support those arguments. They said it would be a breach of procedural fairness not to allow them to do so now or at the redetermination. Fort McKay First Nation had the opportunity to provide evidence, as they did by providing Mr. Gardiner’s affidavit, in their October 26th submission. They had a further opportunity in their December 18th, 2020 request for reconsideration.

As noted earlier, the parties were informed on October 9th that they could provide comments on the panel’s interpretation of the scope of the hearing. The panel had no expectation that the parties should put forward expert evidence at that time. However, a party making the case for adding an issue to a redetermination hearing bears the onus to show that: i) there has been a material change in circumstances; or ii) there is new evidence that was not previously available. The requestor must provide some convincing evidence to show there is merit to the request. It is not enough to say we have a new concern, include the issue and we will then provide evidence.

Prosper’s evidence about the Rigel Project’s expected economic impacts – jobs, taxes, royalties – was not contested at the hearing. We are not persuaded by Fort McKay First Nation’s argument, made without supporting evidence, even publicly available evidence such as relevant oil price forecasts, that changes to market conditions since 2018 constitute a material change in circumstances that warrants a reopening of the evidence on the Rigel Project’s economic benefits.

The parties were given the opportunity to make submissions and put forward their best case on scope, and they did so. We are not persuaded that there has been a significant change in either Prosper’s ability to proceed with the Rigel Project or wider economic circumstances that merit broadening the scope of the redetermination beyond what the Court of Appeal directed.

AER as final decision maker

In its December 16th letter Fort McKay First Nation asked the panel for an answer about whether the AER is now the final decision maker for Prosper's *Oil Sands Conservation Act* (OSCA) application. In its January 5th, 2021 reply submission Prosper agreed with Fort McKay First Nation that all hearing participants would benefit from clarity on the panel's position on this matter.

Because there is no longer an AER decision before cabinet awaiting Lieutenant Governor in Council approval, the Rigel Project decision is not grandfathered by the transition provision. Consequently, the AER is the final decision maker for the purposes of Prosper's *OSCA* application and our decision, if favourable to Prosper, would not be subject to Lieutenant Governor in Council approval. The implications of the AER as final decision maker can be dealt with in the context of the redetermination hearing, as suggested by Fort McKay First Nation in its October 16th letter.

AER Hearing Panel

Cecilia A. Low (Chair)

Christine Macken

cc: M. LaCasse, B. Kapel Holden, AER
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