Alberta Energy Regulator

Prosper Petroleum Limited

Rigel Oil Sands Project

Costs Awards

November 3, 2021

Alberta Energy Regulator
Costs Order 2021-02: Prosper Petroleum Limited, Rigel Oil Sands Project

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Introduction

[1] In 2018, the Alberta Energy Regulator (AER) held a hearing to consider Prosper Petroleum Limited's application made pursuant to section 10 of the *Oil Sands Conservation Act* (*OSCA*) for its Rigel oil sands project.

[2] In the same hearing, the AER also considered Prosper's related applications for approvals under the *Water Act* and the *Environmental Protection and Enhancement Act* (*EPEA*). In decision *2018 ABAER 005*, dated June 12, 2018, the AER approved, subject to the approval of the Lieutenant Governor in Council, Prosper's *OSCA* application, finding the project to be in the public interest.

Background

[3] Fort McKay Métis Nation and Fort McKay First Nation were both participants in the hearing. Fort McKay First Nation successfully appealed the AER's decision to the Alberta Court of Appeal. The court found that the AER erred by not considering the honour of the Crown and the Moose Lake Access Management Plan (MLAMP) process. In accordance with the direction of the Court of Appeal in *Fort McKay First Nation v Prosper Petroleum Ltd. 2020 ABCA 163*, the AER reopened the hearing for the purpose of redetermining whether approval of the Rigel project would be in the public interest after completing the evidentiary record about the MLAMP process and taking into consideration the honour of the Crown and the MLAMP process.

[4] Fort McKay Métis Nation also sought permission to appeal the AER's decision to approve the Rigel project. Two of the grounds on which it sought to appeal were described by the court as whether the AER

- erred in law and breached procedural fairness when it misapprehended the legal test to assess potential adverse impacts on rights protected by section 35 of the *Constitution Act, 1982* and
- erred in its application of the test for assessing the public interest.[1]

[5] Permission to appeal was refused on all grounds.

[6] On June 24, 2020, the AER wrote to Fort McKay First Nation and Prosper advising the parties that the panel was prepared to proceed with the redetermination as directed by the Court of Appeal. The parties were asked to confirm by July 9, 2020, whether they were prepared to proceed and if not when they would be.

[1] *Fort McKay Métis Community Association v. Alberta Energy Regulator*, 2019 ABCA 15 @ paragraph 15.

[7] Prosper confirmed its readiness on July 9. Fort McKay First Nation asked for an extension of time. By way of a letter dated July 15, 2020, Fort McKay First Nation argued that it would be premature for the AER to proceed with the redetermination for several reasons, including the need to wait for the MLAMP to be finalized. However, it said that if the AER did go ahead with the redetermination proceeding, Fort McKay First Nation would not be prepared to proceed until January 2021. On July 21, 2020, Prosper responded to Fort McKay First Nation's submissions concluding that the panel should proceed without delay to commence the redetermination process and to establish reasonable deadlines that enable the process to conclude in an expedient fashion.

[8] On July 28, 2020, the AER issued a notice of hearing for the redetermination. The notice formally confirmed Prosper and Fort McKay First Nation as parties. The notice also said that because they were a party to the original hearing, Fort McKay Métis Nation did not have to file a request to participate, but they were required to confirm their intention to participate and the extent of any intended participation.

[9] On August 10, 2020, Fort McKay Métis Nation confirmed their intent to participate and the extent of their participation in the redetermination.

[10] On February 8, 2021, Alberta filed a copy of the MLAMP along with a written statement. It advised that MLAMP had received Government of Alberta approval and would be effective immediately as government policy respecting the Crown's lands and resources to which it pertained.

[11] On February 16, 2021, the AER received a motion from Prosper to adjourn the hearing while it assessed the implications of the MLAMP for the Rigel project. The motion was granted, and on March 1, 2021, a notice of adjournment of hearing was issued. Several extensions of the adjournment were requested and subsequently granted.

[12] On April 30, 2021, Prosper withdrew its *OSCA* application 1778538 as well as the *Water Act* and *EPEA* applications 00370772-001 and 001-341659 and requested the panel cancel proceeding 350.

[13] In accordance with section 4(2) of the *AER Rules of Practice*, the panel authorized Prosper's request to withdraw its applications. The public hearing was cancelled, and a notice of cancelled hearing was issued.

[14] Both Fort McKay Métis Nation and Fort McKay First Nation filed applications for an award of costs arising from the redetermination proceeding. We established a separate process for each application. The submissions in both processes raised a preliminary issue that was decided by the panel on August 17, 2021.[2] At the time we decided to deal with the preliminary issue, Fort McKay Métis Nation had filed a

[2] The preliminary issue was whether the AER has the jurisdiction to name the Crown as a person who is to pay in an order for costs in the circumstances of this proceeding. We found the following:

> The AER has the jurisdiction to issue a costs order naming a person who is not an applicant or an approval holder as a person who is to pay costs.
>
> The AER's discretion to issue a costs order naming a person who is not an applicant or an approval holder does not extend to naming the Crown in the circumstances of this case.

complete application for costs, Prosper had responded, and Fort McKay Métis Nation had filed its reply to Prosper.

[15] The AER considers Fort McKay Métis Nation's cost claim process to have closed on August 17, 2021, the date the decision on the preliminary issue was communicated to the parties.

The AER's Authority to Award Costs

[16] The AER's jurisdiction to award costs arises from the *Responsible Energy Development Act* (*REDA*), section 61(r), which gives it the authority to make rules governing the awarding of costs. The key sections of the *Rules of Practice* governing the award of costs in this matter are 58.1, 62, and 64. Section 62 says a participant may apply for an award of costs and sets out when an application must be made and what information must be included.

[17] The AER has broad discretion in deciding whether to award costs. Section 64 of the *Rules of Practice* states, "The Regulator may award costs to a participant if it finds it appropriate to do so in the circumstances of the case, taking into account the factors listed in section 58.1."

[18] When assessing applications for an award of costs, the AER is also guided by *Directive 031: REDA Energy Cost Claims*. Prosper, in effect, disputed the entirety of Fort McKay Métis Nation's claim. In addition to considering the submissions of the parties, we have considered each claim for compliance with the *Rules of Practice* and *Directive 031*.

Costs Claim of Fort McKay Métis Nation

[19] The relevant portions of Fort McKay Métis Nation's claim are reproduced below.

Lawyer	Total Fees Claimed	Total GST Claimed	Total Claimed
Professional fees for JFK Law Corporation	$73 922.54	$3 696.13	$77 618.67
Professional fees for MLT Aikins	$929.20	$122.78	$1 052.98
Total	**$74 851.74**	**$3 819.91**	**$78 671.65**

[20] Fort McKay Métis Nation claimed only legal fees. They did not claim expert's fees, honoraria, disbursements, or expenses.

Views of Prosper

[21] Prosper argued that the AER should not exercise its discretion to award costs to Fort McKay Métis Nation in this case. In the alternative, Prosper said the AER should direct the Government of

In addition, and in any event, Prosper's argument regarding the conduct of the Crown is not relevant to our decision about whom to name in any order for payment of costs. We were not persuaded that the circumstances in this case justify a departure from the presumption that the applicant or approval holder would be named in any order we may make for payment of costs.

Alberta to pay Fort McKay Métis Nation's reasonable costs for the redetermination proceeding. The latter point was the subject of our decision on the preliminary issue and will not be dealt with further in this decision. In the further alternative, Prosper argued that the costs claimed by Fort McKay Métis Nation are excessive.

The AER's Discretion to Award Costs in these Circumstances

[22] Prosper noted that participants in AER hearings are not automatically entitled to be reimbursed their hearing costs. Prosper argued that it should not have to pay Fort McKay Métis Nation's costs for several reasons summarized as follows:

- It is not fair to Prosper to have to pay costs for the redetermination hearing because it was the result of an error in law made by the AER in the original hearing.
- It would be unjust for Prosper to have to pay costs since it was effective petitioning of the Government of Alberta by Fort McKay Métis Nation and Fort McKay First Nation to establish the MLAMP that forced Prosper to cancel the Rigel project and caused it serious hardship.
- Fort McKay Métis Nation will not be unduly prejudiced if it is required to bear its costs.
- The costs to all parties of the redetermination proceeding could have been avoided if the Government of Alberta had finalized the MLAMP in a timely manner.

Prosper characterized Fort McKay Métis Nation's participation as limited.

Are the Costs Claimed Reasonable and Necessary?

[23] Prosper identified specific elements of Fort McKay Métis Nation's claim for costs that it said were excessive or unnecessary for Fort McKay Métis Nation's participation in the redetermination proceeding.

[24] First, Prosper referred to *Directive 031* and noted the general rule that the AER does not award costs incurred before the notice of hearing is issued. The notice for the redetermination hearing was issued July 28, 2021. Fort McKay Métis Nation claims costs incurred before the notice was issued. Prosper said Fort McKay Métis Nation provided no justification for departing from the general rule.

[25] Second, Prosper pointed to fees claimed for two law firms for the period July 13, 2020, to August 4, 2020, and for correspondence between the two firms in November 2020. It said that the choice to change law firms, from the firm that represented Fort McKay Métis Nation at the original hearing to a new firm for the redetermination, and the associated costs were not necessary for Fort McKay Métis Nation's participation in the redetermination proceeding.

[26] Third, Fort McKay Métis Nation's claim includes fees for seven different lawyers in two firms. Prosper noted the AER has been clear in previous decisions that it will award costs for more than one

legal counsel only in exceptional circumstances. The exceptional cases usually involve numerous and or complex issues that merit costs for a senior and a junior counsel. Where costs for more than one counsel have been awarded, they are not for work on the same issue or aspect of the hearing.

[27] Prosper also said that Fort McKay Metis Nation's lead counsel performed tasks more suited to junior lawyers and that there were instances where there was duplication of effort by multiple lawyers.

[28] Fourth, Fort McKay Métis Nation claims time for two paralegals. Prosper submitted that costs should not be awarded for time recorded by the paralegals because Fort McKay Métis Nation had not demonstrated that work could not have been performed by a legal assistant.

[29] Fifth, Prosper argued that costs relating to the following are not recoverable because they were not necessary for Fort McKay Métis Nation's participation in the redetermination:

- The Aboriginal Consultation Office (ACO) consultation adequacy decision, ACO processes, and Fort McKay Métis Nation correspondence with the ACO
- Negotiations between Fort McKay Métis Nation and Prosper about an impact benefit agreement and term sheet
- Fort McKay Métis Nation correspondence with federal and provincial ministers
- Work to review and search Alberta Court of Queen's Bench (ACQB) proceedings on a civil matter unrelated to MLAMP and correspondence with the ACQB

[30] Sixth, Prosper disputed that any costs for work may be awarded where the description of that work is redacted from the statements of account filed in support of the application for costs.

[31] Finally, Prosper submitted the reasonable costs for Fort McKay Métis Nation to participate in the redetermination proceeding would be $20 800 plus GST. It calculated that amount based on 40 hours of time at $350 per hour for a lawyer with 12 or more years of experience and 80 hours of time at $210 per hour for a lawyer with 1–2 years of experience. Prosper also cited what it characterized as the narrow scope of the redetermination proceeding and the nature of the legal work required prior to the cancellation of the hearing.

Views of the Fort McKay Métis Nation

[32] Fort McKay Métis Nation rejected Prosper's submissions that it should not have to pay costs. They pointed out that *Directive 031* explicitly permits participants to apply for costs when an application has been withdrawn. They also said Prosper had the choice whether to continue to pursue its application through the redetermination process, and that costs to all parties could have been avoided if Prosper had chosen to wait for the final MLAMP to be released.

[33] Referring to Prosper's submissions about serious hardship caused to it by cancellation of the Rigel project, Fort McKay Métis Nation noted that Prosper was aware of the MLAMP negotiations and the risk those negotiations posed to the Rigel project.

[34] Fort McKay Métis Nation disputed Prosper's characterization of their participation in the redetermination as limited. Fort McKay Métis Nation said they had to participate in the redetermination proceeding "to defend and assert their Métis rights to the proposed project area."

[35] Fort McKay Métis Nation said that the AER should exercise its discretion to award costs for work completed before the notice of hearing was issued because "all parties were certain of the hearing," and the work was directly related to the hearing.

[36] Fort McKay Métis Nation said they had not claimed costs for changing counsel and that they only claim costs for legal services directly related to the redetermination hearing.

[37] In response to Prosper's objection to its claim for costs for the work of more than one lawyer, Fort McKay Métis Nation described the file as complex in nature and noted there was a significant gap between the original and redetermination proceeding. They said those factors meant the work conducted was reasonable and appropriate.

[38] Fort McKay Métis Nation then argued that the hours claimed are not "grossly excessive" and the legal team was staffed appropriately given the novel and complex issues raised. Fort McKay Métis Nation specifically cited as issues how the honour of the Crown was engaged in the MLAMP process and the cumulative effects the Rigel project would have on its section 35 Aboriginal rights. They went on to say most of the legal work had been carried out by three lawyers: a senior lawyer and two associates at different levels of call. They also referred to a fourth senior lawyer who provided high-level strategic advice when JFK took carriage of the file.

[39] About duplication of fees, Fort McKay Métis Nation responded $13 974.96 had been written off to account for that.

[40] Fort McKay Métis Nation said the fees claimed for the paralegals included tasks that could not have been performed by a legal assistant and would otherwise have been performed by a junior associate at greater expense.

[41] In response to Prosper's argument that certain costs were not necessary for Fort McKay Métis Nation's participation in the proceeding and not recoverable, Fort McKay Métis Nation said the costs identified by Prosper were all related to the redetermination hearing. They said they did not claim costs for negotiations with Prosper regarding an impact benefit agreement. And they said time billed for ACQB civil proceedings was for review of Prosper's lawsuit against Alberta regarding the MLAMP process.

[42] Fort McKay Métis Nation also responded that they are not claiming fees for time redacted in the statements of account. They said the amount of time redacted from each invoice is set out on the front page of the invoice. They also said no costs were claimed where a description of work was completely redacted and for partial redactions only a portion of the work listed was claimed.

[43] Out of a total of $88 633.18 in the invoices, Fort McKay Métis Nation responded that it claimed only $78 671.65 after accounting for redactions and write-offs. They also said, "this reduction results from the adjustment of the hourly fees reflected in the invoices to the AER scale of costs."

[44] Fort McKay Métis Nation concluded its response arguing that what Prosper said would be reasonable for costs is too low and is the result of Prosper's efforts to unduly narrow the scope of the redetermination hearing and the work required by Fort McKay Métis Nation to defend its section 35 Aboriginal rights. They submitted that $78 671.85 is reasonable and necessary given the complex nature of the application and the extensive written submissions and affidavit evidence required.

Views of the AER

Is It Appropriate to Exercise Our Discretion to Award Costs?

[45] According to the *Rules of Practice*, only a "participant" may file an application for costs. Section 58(1)(c) defines a "participant" as a person who has been permitted to participate in a hearing for which notice of hearing is issued. The panel previously determined that Fort McKay Métis Nation was a participant in the redetermination hearing, so they are eligible to apply for costs incurred to participate in the hearing.

[46] Section 61(r) of *REDA* explicitly contemplates costs awards for hearings on an application. The effect of the Court of Appeal's decision in *Fort McKay First Nation v. Prosper* is that we had to reopen the original hearing of Prosper's *OSCA* application to complete the evidentiary record on the MLAMP process. In addition, section 6.6 of *Directive 031* is clear that withdrawal of an application is not a bar to a claim for costs. Accordingly, we find it appropriate to consider the applications for costs for the redetermination.

[47] A draft MLAMP was released for public input in February 2018, shortly after the close of the original hearing and after many years of negotiations. Prosper was, at the very least, aware of the negotiations leading up to the draft MLAMP. As noted above, Fort McKay First Nation asked that the redetermination proceeding not go ahead while the MLAMP was being finalized. Arguing, as Prosper did, that the redetermination should proceed in any event raised the risk that the process could be rendered unnecessary if the MLAMP was finalized before a decision was reached on the redetermination.

[48] We find Prosper's fairness arguments are not a compelling reason why Fort McKay Métis Nation should bear its own costs.

Costs Claimed Are Excessive

[49] The factors in section 58.1 of the *Rules of Practice* most relevant to our consideration of Fort McKay Métis Nation's application for costs are:

> (a) whether there is a compelling reason why the participant should not bear its own costs;
>
> (k) whether the costs were reasonable and directly and necessarily related to matters contained in the notice of hearing on an application or regulatory appeal and the preparation and presentation of the participant's submission;
>
> (r) any other factor that the Regulator considers appropriate.

[50] Other factors we considered appropriate were directions provided in *Directive 031* and guidance provided in previous cost orders:[3]

- Costs should be proportionate to the matter they relate to.
- Costs are not available for preparation of an application for costs.
- Costs must be clearly justified.
- Costs for work that is secretarial in nature or that a legal assistant could do are not recoverable.
- Costs awards are not intended to fully indemnify a participant, nor are they intended to fully relieve a participant of the financial burden of participation.

[51] Fort McKay Métis Nation has claimed costs incurred before the notice of hearing issued on July 28, 2020. We calculate these costs to be $2425.95 based on the statements of account filed by Fort McKay Métis Nation.[4] We are not persuaded that there are extraordinary circumstances here warranting an exception to the general rule that costs are not awarded that were incurred before notice of hearing was issued. Indeed, in light of the debate between Fort McKay First Nation and Prosper about whether the redetermination should proceed or not, no one could know whether the redetermination hearing would proceed until the notice of hearing was issued.

[52] The statements of account show work that was either not directly and necessarily related to matters contained in the notice of hearing and the preparation and presentation of the participant's submission, or is work *Directive 031* says is not eligible for a costs award:

- Researching cost claims – e.g., research AER advance funding regime and draft memo for D. Stuckless, reviewing advanced costs Memorandum from L. Edwards
- Negotiating with Prosper – e.g., Review term sheet for agreement with Prosper, Call with D. Stuckless on Prosper Agreement, discussions with C. Leonard about reaching out to Prosper

[3] For example, see *Costs Order 2019-02*, *Costs Order 2018-01*, and *Costs Order 2016-01*.

[4] $2425.95 = $700.00 JLL + $704.00 RAD + 1021.95 MLT Aikins

- Work and research into ACQB matter – e.g., Instructions to pull pleadings in Prosper litigation against the Government of Alberta, telephone call to Court of Queen's Bench
- Correspondence with the Government of Alberta – e.g., revisions to letter to Minister Nixon, receipt of signed letter to Minister Nixon regarding consultation on MLAMP, finish drafting letter to Aboriginal Consultation Office
- Paralegal costs that are not independent, substantive law work, e.g., proofreading submissions, OCRing in Eclipse, receiving USB from MLT Aikins

[53] In addition, the matters for hearing did not extend to a redetermination of the potential impacts on Fort McKay Métis Nation's section 35 Aboriginal rights. They were denied permission to appeal on that point, and the redetermination proceeding was not an opportunity to revisit that issue. Similarly, Fort McKay Métis Nation made submissions during the redetermination process challenging the ACO's consultation determination. The ACO's process was not at issue before the Alberta Court of Appeal in *Fort McKay First Nation v. Prosper* and was not an issue for the redetermination hearing. We find costs related to these two matters were not directly and necessarily related to matters contained in the notice of hearing.

[54] Except for the $670.50 claimed for two paralegals whose work we determined to be work that could have been performed by a legal assistant, it was not possible to calculate the costs associated with work not eligible for a costs award because, except for one or two instances, that work was identified in a series of enumerated tasks associated with a single time entry in the statements of account.

[55] In addition, as noted by Prosper, the statements of account contain redactions and duplication of work. Redacted work cannot be justified for the purposes of a costs award. Fort McKay Métis Nation said in its reply submissions that the amount of time redacted from each invoice is set out on the front page. The front page of some of the statements of account shows, in red ink, amounts that were "removed" from those accounts. The last page of some invoices shows amounts identified as "write offs at lawyer's request." However, there is no way for us to reconcile what was redacted or considered duplication of effort with what is claimed or to otherwise assess how the amounts claimed, redacted, removed, and written off relate to the enumerated tasks.

[56] Similarly, we were unable to assess how the $78 671.65 claimed also reflected an adjustment in hourly fees to line up with the AER's scale of costs.

[57] The information that must be submitted in support of an application for costs is required to ensure transparency and the AER's ability to determine whether the costs claimed are appropriate, reasonable, and directly and necessarily related to matters contained in the notice of hearing.

[58] Fort McKay Métis Nation has claimed time starting June 24, 2020, ending on July 28, 2020, for two lawyers from the law firm that represented Fort McKay Métis Nation at the original hearing, MLT

Aikins. JFK Law Corporation's statements of account also record time for the redetermination hearing starting July 13, 2020. We have already indicated that costs incurred before the notice of hearing was issued will not be awarded. In addition, and in any event, costs that are duplicative are not reasonable and will not be awarded. The balance of costs for MLT Aikins after the notice of hearing is $89.78 and are not recoverable.

[59] Fort McKay Métis Nation's application for costs lists four lawyers and one law student, all with JFK Law, who assisted with the redetermination proceeding. The bulk of the time recorded in the statements of account is for two lawyers, one with seven years' experience and the other with one. The most senior lawyer, with more than twelve years' experience, appeared to mostly provide "strategic advice" and has time recorded in January 2021 for negotiations with Alberta on MLAMP and with Prosper on an impact benefits agreement, which is not recoverable. Another senior lawyer, with twelve years' experience, recorded a substantial amount of time including time for research of case law and procedural rules for the AER.

[60] It is open to participants to staff hearings in the way they see fit. However, *Directive 031* and past decisions make it clear that where costs are claimed for more than one lawyer, the additional costs must be justified by the number and complexity of the issues or some other factor or factors specific to the hearing. They also make it clear that work should be carried out as efficiently as possible—for example, more-junior lawyers conduct research and more-senior lawyers provide direction and take the lead in the hearing. *Directive 031* also says that the maximum allowable hourly rates are not awarded as a matter of course. The scale of costs is a sliding scale established on the basis that a professional's fees increase as they gain experience.

[61] As noted above, the key issue for the redetermination was novel and important. It was not complex. The evidentiary record about MLAMP had to be completed. No expert evidence was required. Legal argument would then have to be made about whether the record showed that the honour of the Crown had been engaged and, if so, whether the Rigel project could still be found to be in the public interest. We are not persuaded that it is reasonable to award Fort McKay Métis Nation costs incurred for more than two lawyers for responding to the questions that arose in the redetermination process up to the point Prosper withdrew its *OSCA* application or for the preparation of the affidavits filed by Fort McKay Métis Nation and their submissions on the issues identified for the redetermination. We are also not convinced that the circumstances of the hearing are extraordinary or in some other way merit an award of costs for more than two lawyers. Therefore, we have deducted $700.00 for the most senior lawyer who provided the strategic advice and who also recorded time for negotiations. We have also deducted $441.00 for the law student.

[62] Considering all the above, we find that a reasonable allocation of time and legal resources for the redetermination proceeding considering the novelty and importance of the narrow issues identified in the

notice of hearing would be 40 hours for a senior lawyer of 12 years of experience at $350.00 per hour and 200 hours of work by a junior lawyer or lawyers with a blended rate of $245 per hour.

Order

[63] The AER hereby orders that Prosper pay costs in the amount of $47 417.51 and GST in the amount $2370.88, for a total of $49 788.39. This amount must be paid within 30 days from issuance of this order to

Jeff Langlois
JFK Law Corporation
340 – 1122 Mainland Street
Vancouver BC V6B 5L1

Dated in Calgary, Alberta, on November 3, 2021.

Alberta Energy Regulator

Cecilia Low, B.Sc., LL.B., LL.M.
Presiding Hearing Commissioner

Christine Macken
Hearing Commissioner

Appendix 1 Summary of Costs Claimed and Awarded

Table 1. Costs claimed and awarded

Total Fees/ Honoraria Claimed	$74 851.74
Total Expenses Claimed	$0.00
Total GST Claimed	$3 819.91
Total Amount Claimed	**$78 671.65**
Total Fees/ Honoraria Awarded	$47 417.51
Total Expenses Awarded	$0.00
Total GST Awarded	$2 370.88
Total Amount Awarded	**$49 788.39**
Reduction	**$28 883.26**

Table 2. Costs claimed and *not* awarded

Prehearing Costs	$2 425.95
Paralegal Costs	$670.50
MLT Aikens Hearing Costs	$89.78
12+ Years Lawyer Costs	$700.00
Articling Student Costs	$441.00
Difference Between Costs Claimed for 12 yr. Lawyer and Costs Awarded	$4 935.00
Difference Between Costs Claimed for 7 year and 1 Year Lawyer and Costs Awarded for Junior Lawyer	$18 172.00
Difference in GST	$1 449.03
Total Reduction	**$28 883.26**