Alberta Energy Regulator

Prosper Petroleum Limited

Rigel Oil Sands Project

(Fort McKay First Nation Decision)

Costs Awards

December 13, 2021

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Costs Order 2021-03: 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 First Nation and Fort McKay Métis 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* (*Fort McKay First Nation* v. *Prosper*), 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] On June 24, 2020, the AER wrote to Fort McKay First Nation and Prosper advising them 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.

[5] Prosper confirmed its readiness on July 9. Fort McKay First Nation asked for an extension of time. In 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. They also 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. In its July 21, 2020, response to Fort McKay First Nation, 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.

[6] 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.

[7] On February 8, 2021, Alberta filed a copy of the MLAMP along with a written statement. It advised that the 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.

[8] 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.

[9] 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.

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

[11] Both Fort McKay First Nation and Fort McKay Métis 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.[1]

[12] On August 18, 2021, the panel established submission timelines for Fort McKay First Nation's cost claim. The cost claim process closed on September 16, 2021, when Fort McKay First Nation filed their reply to Prosper's submissions.

The AER's Authority to Award Costs

[13] 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.

[1] 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 approval holder does not extend to naming the Crown in the circumstances of this case.
>
> 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.

[14] 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."

[15] When assessing applications for an award of costs, the AER is also guided by *Directive 031: REDA Energy Cost Claims*. The directive provides direction to hearing participants on how and when to file a claim, the costs that may be claimed, and information on the scale of costs for professional assistance for a participant to make its case to the AER. In addition to considering the submissions of each party, we have reviewed each part of Fort McKay First Nation's claim for compliance with the *Rules of Practice* and *Directive 031*.

Costs Claim of Fort McKay First Nation

[16] Fort McKay First Nation submitted their application for a cost claim on June 5, 2021. The relevant portions of Fort McKay First Nation's claim are reproduced below.

Participant/lawyer/expert	Total fees/honoraria claimed	Total disbursements and expenses claimed	Total GST claimed	Total claimed
Professional fees for Boughton Law Corporation	$127 231.00	1 177.61	$37.79	$128 446.40
Andrew Leach	$7 800.00		$390.00	$8 190.00
Total	**$135 031.00**	**1 177.61**	**$427.79**	**$136 636.40**

[17] On September 2, 2021, Prosper responded and argued that the AER should not exercise its discretion to award costs to Fort McKay First Nation. In the alternative, Prosper said the costs claimed by Fort McKay First Nation are excessive.

The AER's Discretion to Award Costs in These Circumstances

[18] Prosper argued that the AER should not exercise its discretion to require it to pay costs to Fort McKay First Nation for several reasons:

- 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 First Nation and Fort McKay Métis Nation to establish the MLAMP that forced Prosper to cancel the Rigel project and caused it serious hardship.
- Fort McKay First Nation's meaningful participation in the redetermination required only procedural submissions and the preparation of affidavit evidence, much of which had been previously prepared. So, Fort McKay First Nation will not be unduly prejudiced if required to bear those costs.

[19] In reply to Prosper, Fort McKay First Nation referred to the Alberta Court of Appeal decision *Kelly v. Alberta (Energy Resources Conservation Board)*, *2012 ABCA 19*, paragraphs 33 – 34. The Court said in its decision that "it is accepted that citizens have a right to provide input on public decisions that will affect their rights…. It is not unreasonable that the costs of intervention be borne by the resource companies who will reap the rewards of resource development."

[20] Fort McKay First Nation noted that the redetermination resulted from an error of law made by the AER and that it was no fault of theirs that a second hearing was required. They also noted that Prosper urged the AER to reconvene the second hearing despite their request that the hearing be delayed pending the finalization of the MLAMP. They said, had the hearing not proceeded, no costs would have been incurred.

Views of the AER on Awarding Costs

[21] Section 61(r) of *REDA* explicitly contemplates cost awards for hearings on an application. The redetermination proceeding was a reopening of the original hearing on Prosper's *OSCA* application for the purpose of completing the evidentiary record about the MLAMP process.

[22] A draft MLAMP was released in February 2018, shortly after the close of the original hearing. Prosper was aware of the negotiations leading up to the draft MLAMP and of Alberta's intention to finalize the plan, although the timing of a final plan was not known. Prosper argued that the redetermination should proceed and knew the risks involved as the process might be rendered unnecessary if the MLAMP were finalized before the conclusion of the redetermination proceeding.

[23] Section 6.6 of *Directive 031* is clear that parties may claim costs where no hearing is held or where an application is withdrawn. Consequently, Prosper's fairness arguments are not a reason why Fort McKay First Nation should bear their own costs. We find it is appropriate for us to exercise our discretion to award costs in this case.

Are the Costs Claimed for Fees Reasonable and Necessary?

[24] In their initial submission, Fort McKay First Nation said their costs were reasonable and necessary given the complexity of the legal issues. They said that although the Court of Appeal decision provided clarification of the AER's constitutional jurisdiction, it also raised new issues which they were obliged to address. The other issues requiring analysis or additional submissions included the scope of the hearing, the requirements to admit new evidence, and the legality of section 49(1) of *REDA*.

[25] Prosper submitted that Fort McKay First Nation's claim for legal fees was excessive. In many instances, the work was related to matters outside of the scope of the redetermination. It emphasized that the redetermination was narrow in scope and did not proceed to a full hearing. It identified specific elements of the claim that they argued should not be awarded or should be reduced:

- Legal costs for four lawyers: Prosper referred to past decisions of the AER that said costs will only be awarded for work of more than one lawyer in exceptional circumstances.
- Fees for work that was redacted or appeared to be duplication of effort.
- Costs related to the Aboriginal Consultation Office's (ACO's) adequacy decision and related matters and the impact of the Rigel project on Fort McKay's section 35 Aboriginal rights.
- Fort McKay First Nation's efforts to convince the AER to broaden the scope of the hearing.
- Early filing of a Notice of Question of Constitutional Law (NQCL).
- Costs related to review of evidence submitted in separate legal proceedings.
- Costs for preparation of Dr. Andrew Leach's opinion report.

Costs for More Than One Lawyer

[26] Fort McKay First Nation claimed costs for four lawyers – two senior lawyers each with more than 25 years experience, a third lawyer with 10 years experience, and a junior lawyer with 3 years experience. Prosper argued that it would have been reasonable for Fort McKay First Nation to have either one lawyer do all the work or have a senior lawyer oversee strategy with a junior lawyer doing most of the work, particularly research and drafting procedural submissions.

[27] Prosper stated that if costs were awarded, a reasonable award would be $20 800.00 plus GST. It calculated that amount based on 40 hours of work at $350.00 per hour and 80 hours at $210.00 per hour.

[28] Prosper pointed out tasks performed by senior lawyers that it said were more appropriate for a junior lawyer. It noted what appeared to be duplication of effort but said that the redactions made in Fort McKay First Nation's statements of account made the extent of duplication unclear.

[29] In response, Fort McKay First Nation said the work was reasonable and necessary given the "complex nature of the file and significant gap between the first and second hearing." They said the issues for the redetermination were novel and described them as

- how the honour of the Crown was engaged in the MLAMP process;
- the cumulative effects the Rigel project would have on Fort McKay First Nation's section 35 Aboriginal rights;
- how changes in relevant facts and other procedural matters would be treated in the re-hearing.

[30] They also stated that although most of the legal work was conducted by two senior lawyers, they had claimed a lower hourly rate for the second lawyer.

Claims for Items Redacted or Duplicated

[31] Prosper submitted that costs should not be awarded where the relevance of such costs to the proceeding cannot be determined. Of the 407 hours claimed for legal fees, it noted that time entries associated with more than 300 of those hours contain redactions of the description of the work, thus rendering it impossible for Prosper to determine the relevance or reasonableness of those costs.

[32] Fort McKay First Nation acknowledged redactions in their statements of account but said they had not made claims for "fully redacted entries." They did not comment on how partial redactions were reflected in the amounts billed.

Costs for Matters Outside of the Proceeding

[33] Prosper identified costs claims for several items that it said are outside of the scope of the redetermination. Fort McKay First Nation claimed costs for work related to the ACO report and for submissions about cumulative impacts of the Rigel project on their section 35 Aboriginal rights. Prosper said these costs should not be reimbursed as they were not necessary for Fort McKay First Nation's participation in the redetermination.

[34] Fort McKay First Nation responded that they had to put evidence related to the ACO and section 35 Aboriginal rights on the record because the AER may have reassessed its relevance once the evidence was reviewed. They also stated they had to ensure the record was complete for the purposes of any subsequent review by a court.

[35] Fort McKay First Nation submitted that ACO-related costs are recoverable because the AER is obliged to satisfy itself that the ACO's consultation obligations had been completed. They also submitted that the scope of ACO involvement is relevant to any AER hearing involving First Nations.

Submissions on Scope of the Hearing

[36] Prosper argued that the AER should deny costs related to Fort McKay First Nation's efforts to convince the panel to reconsider its December 2, 2020, decision on the scope of the proceeding.

[37] Fort McKay First Nation responded that procedural decisions are not irreversible, and they were obliged to provide the AER with the law and evidence needed to make an informed decision and avoid errors of law on the scope of the hearing.

Notice of Question of Constitutional Law

[38] Prosper submitted that costs should not be awarded for preparation and filing of the NQCL. It said the notice was submitted earlier than required and its relevance was contingent on approval of the project, which never occurred.

[39] Fort McKay First Nation acknowledged that work related to the NQCL contributed to their costs. They said the NQCL was complex and was necessary to assist the panel considering an amendment to section 10 of *OSCA* made in October 2020. The amendment removed the requirement for the AER to obtain cabinet authorization before issuing final approvals for projects approved under section 10 of *OSCA*.

[40] Fort McKay First Nation claimed that the *OSCA* amendment raised complex legal questions about constitutional duties and obligations and the validity of certain Alberta legislation. They also noted the panel's procedural decision of January 14, 2021, that "the implications of AER as final decision maker can be dealt with in the context of the redetermination hearing."

Evidence in Separate Legal Proceedings

[41] Prosper said Fort McKay First Nation's consideration of evidence submitted in separate legal proceedings was unrelated to the MLAMP, so costs should not be awarded because the work was for matters beyond the scope of the redetermination.

[42] Fort McKay First Nation did not specifically address this element in their reply submission. We understand their original and reply submissions on this point to be the same as for the preparation of the Andrew Leach report.

Preparation of Andrew Leach Report

[43] Prosper submitted that costs should not be awarded to prepare evidence about matters already determined to be outside of the scope of the redetermination, including Prosper's financial status and expected economic benefits of the Rigel project.

[44] Fort McKay First Nation replied they were obliged to put their best argument and evidence on the record about issues they argued were included in the hearing scope. They said this was to give the AER information it needed to make an informed decision and establish a record for any appeal.

Views of the AER on Fees

Overarching Considerations

[45] When considering applications for cost awards, we must consider the factors set out in section 58(1) of the *Rules of Practice*. Section58(1)(k) requires the AER to consider "whether the costs were reasonable and directly and necessarily related to matters contained in the notice of hearing." We are also

guided by directions to participants provided in *Directive 031* and decisions in previous cost awards[2], specifically:

- Costs should be proportionate to the matter they relate to.
- Costs must be clearly justified.
- Cost awards are not intended to fully indemnify a participant or fully relieve a participant of the financial burden of participation.

[46] We have reviewed the statements of account filed in support of the cost claim to verify the costs are directly relevant and necessary to the matters outlined in the notice of hearing. Although we have identified items eligible for an award, we were unable to associate specific sums with specific work descriptions. The invoices provided by Fort McKay First Nation identify individual items of work as part of a series of tasks associated with a single time entry.

[47] For instance, on August 24, 2020, there is an entry for review of the ACO letter, revisions, and changes to the letter as well as emails on the scope of the reconsideration and strategy for the hearing. We cannot determine how much of the $700 billed for this entry is allocated to each component. The August 2020 statement contains several entries for work related to both ACO issues and hearing issues. We are unable to determine how much of the $8000 billed for August was directly related to the hearing.

[48] A September 14, 2020, entry covers

…review and revise issues and evidence table, review economist report A Leach; review B. Gardiner affidavits in injunction application for use at AER hearing; review and revise litigation flow charts; review affidavit of K. Buffalo; email to [redacted] telephone attendance on [redacted].

Of the $1680 billed for this entry, we don’t know the specific amount for each item.

[49] There is insufficient detail in the statements of account and in Fort McKay First Nation’s submissions to distinguish costs for work directly and necessarily related to the matters in the notice of hearing from work that was not. Similarly, we could not calculate amounts associated with work that appears to be duplicative or general in nature. For example, there are numerous entries for updating or revising an issues and evidence table. Duplication of work is not efficient and so not reasonable unless the claimant shows that duplication was necessary and reasonable in the circumstances.

[50] Finally, most of the entries contained redactions. Redacted work cannot be justified for a costs award, and we were not able to determine from the materials filed by Fort McKay First Nation if or how the redactions were taken into account in their claim.

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

[51] Despite these limitations, we reviewed the accounts in detail to better understand the amounts that might be eligible or ineligible for a cost award.

Costs for More Than One Lawyer

[52] *Directive 031* and past AER decisions are clear that costs will only be awarded for more than one lawyer in exceptional circumstances. If costs are claimed for more than one lawyer, they must be justified by the complexity and the number of issues.

[53] *Directive 031* also states that the maximum hourly rates are not awarded as a matter of course and that a lawyer's statement of account must include sufficient detail to demonstrate that all items billed were necessary and related to the proceeding.

[54] Fort McKay First Nation claimed legal fees for 407 hours, of which 386.50 hours were for two senior lawyers (one lawyer with 36 years experience and the second with 28 years experience). The most senior lawyer recorded 201.30 hours at $350.00 per hour, and the second lawyer recorded 185.20 hours at $280.00 per hour.

[55] The most senior lawyer conducted a wide range of legal services, including:

- developing strategy,
- reviewing documents in related and nonrelated proceedings,
- researching *Bill 22*,
- reviewing AER directives as well as *OSCA*, the *Water Act*, *REDA*, and *EPEA*,
- reviewing case law,
- reviewing and revising various correspondence and documents,
- revising issues and evidence table, and
- attending meetings, preparing for hearings, and sending and reading emails.

[56] The second senior lawyer did similar tasks, including:

- researching AER past decisions regarding reconsiderations,
- researching AER requirements for affidavits and motions,
- researching *Bill 22*,
- reviewing case law,
- drafting documents and letters,
- developing and reviewing strategy,

- reviewing and updating issues table, and
- attending meetings, preparing for hearings, reviewing submissions, and sending and receiving emails.

[57] *Directive 031* and past decisions are clear that costs claimed for more than one lawyer must be justified by the number and complexity of the issues or some other factor specific to the hearing. In addition, past decisions have consistently found that work should be carried out as efficiently as possible. For example, junior lawyers researching and drafting pleadings and senior lawyers providing direction and leading in the hearings.

[58] The hearing was narrow in scope and focused on whether the honour of the Crown was engaged by the MLAMP process and, if it was, the implications of that for whether the Rigel project could be found to be in the public interest. We agree with Fort McKay First Nation that the issue was novel and important, but it was not complex. The evidentiary record had to be completed through the filing of affidavits with respect to Alberta's engagement with Fort McKay First Nation on the MLAMP. Expert evidence was not required. Legal argument would then have been made about whether the evidence demonstrated that the honour of the Crown had been engaged.

[59] We are not convinced that the circumstances of the hearing were so exceptional as to require 385 hours of work by two senior lawyers. Given the limited scope of the hearing, the total number of hours claimed – 407 – is excessive and not proportionate. We find that a more reasonable allocation of legal resources for Fort McKay First Nation's participation in the proceeding is 45 hours for a senior lawyer to oversee strategy on the file and 225 hours for a junior to intermediate level lawyer to conduct legal research, review case law, and draft correspondence and pleadings.

Costs for Items Redacted or Duplicated

[60] The statements of account contain numerous entries with partial redactions. Some examples are:

- September 4, 2020: Email from [Redacted] re research; Email to [Redacted] re briefing note for [Redacted]
- September 9, 2020: Email to and from [Redacted] re: [Redacted] meeting; prepare for and attend [Redacted] meeting
- October 22, 2020: Prepare for and attend conference call with [Redacted].

Additionally, there are similar entries on the same day for work conducted by each of the senior lawyers:

- November 6: KEB, entry includes "review submission"
- November 6: JMC, entry includes "review our submissions"
- November 18: KEB, telephone conference with [Redacted] re prehearing meeting preparation

- November 18: JMC, prepare for and telephone conference on [Redacted] re [Redacted] prehearing conference and evidence
- December 2: KEB, review letter from AER re scope of hearing and consider response [Redacted]
- December 2: JMC, review AER ruling on scope of hearing; ….and prepare reply to AER for reconsideration
- January 31: Both lawyers made entries for review and revision of the NQCL and work on motion for new evidence.

[61] There is insufficient detail in the statements and Fort McKay First Nation's submissions to allow us to determine the relevance of the partially redacted items and whether the work was directly and necessarily related to the matters in the notice of hearing. We cannot verify if or how redactions were accounted for by Fort McKay First Nation in their claim. *Directive 031* is clear that costs should not be awarded where their relevance cannot be determined. Additionally, because of the way tasks are entered in the statements of account, we cannot calculate with any accuracy the specific number of hours or fees associated with partially redacted entries.

[62] Finally, we conclude that there was duplication of effort for several items, but we cannot determine specific amounts associated with the duplicated legal work.

Costs for Matters Outside of the Proceeding

[63] The cost claim contains many entries for work conducted on the ACO process. Fort McKay First Nation claimed costs for review of the ACO reports, reviewing correspondence between the ACO and third parties, and writing to the ACO and other parties regarding the reports.

[64] Adequacy of consultation was not at issue in *Fort McKay First Nation v. Prosper*. Additionally, on September 29, 2020, the ACO provided a written statement to the redetermination hearing that it considered consultation on the Rigel project to be adequate and complete. It pointed out in its letter that ACO decisions expressly pertain to regulatory decisions under the *Water Act* and *EPEA*.

[65] On December 18, 2020, the ACO provided a further written statement and said that *OSCA* is not currently a specified enactment to which the *REDA* section 67 Minister's Order applies; therefore, it would not be observing or participating in the proceeding. The matter before us in the redetermination was Prosper's *OSCA* application.

[66] The cumulative effects of the Rigel project on Fort McKay First Nation's section 35 Aboriginal rights were not within the scope of the redetermination. In granting Fort McKay First Nation leave to appeal, the Court denied them permission to appeal on that point.

[67] We issued various decision letters in which we confirmed that for reasons and direction provided in the Court of Appeal decision, consultation was not an issue for the redetermination. Nor did the hearing extend to an examination of impacts on Fort McKay First Nation's section 35 Aboriginal rights.

[68] The ACO process, adequacy of consultation, and impacts on section 35 Aboriginal rights were not in scope for the redetermination and are not eligible for costs. Again, we were unable to calculate the specific costs for the work on the out-of-scope issues using Fort McKay First Nation's invoices and submissions.

Submissions on Scope of the Hearing

[69] We did invite the participants to provide their views on Prosper's proposed scope of the hearing. Fort McKay First Nation made a submission on October 26, 2020. We issued our decision on December 2. On December 18, Fort McKay First Nation filed a request for reconsideration stating that the panel had misunderstood their earlier submission. They argued that we should reconsider our December 2 decision, and they should be allowed to file new evidence about Prosper's viability and the expected economic benefits of the Rigel project. We were not convinced by the submission, nor did we change our decision on the scope of the hearing; we did not allow new evidence to be admitted.

[70] Parties are entitled to make submissions to a panel concerning decisions they contend should be reconsidered. Similarly, parties are entitled to make their case and put their best evidence forward. The question we must answer is whether the costs claimed are reasonable and directly and necessarily related to the proceeding.

[71] Costs related to Fort McKay First Nation's October 26 and December 18, 2020, submissions on scope of the hearing are eligible for costs. However, as noted above, the statements of account do not contain sufficient detail to allow us to determine with confidence the amount of these costs.

Notice of Question of Constitutional Law

[72] Guidance on a NQCL is found in the *Administrative Procedures and Jurisdiction Act*. Section 12 states that a person who intends to raise a question of constitutional law must do so *at least 14 days* before the date of the proceeding [emphasis added]. Section 12(3) states that nothing in the section affects the power of a decision maker to make any decision it considers necessary pending the final determination of any matter before it.

[73] Fort McKay First Nation filed an NQCL on February 1, 2021, requesting several forms of relief. Among the relief sought was that the panel should

- refuse to grant approval for the Rigel project pursuant to section 10(3)(b) of *OSCA*;
- find various sections of *OSCA*, *REDA* and *Lower Athabasca Regional Plan* to be invalid;

- determine that Fort McKay First Nation's right to be consulted in respect of Prosper's *OSCA* application is triggered and has not been satisfied;
- determine whether the MLAMP triggered the honour of the Crown and, if yes, would it be consistent with the honour of the Crown for the AER to approve, deny, or delay approval of the project; and
- determine whether section 21 of *REDA* prevents the AER from complying with a constitutional imperative flowing from the honour of the Crown to ensure that consultation with Aboriginal groups is adequate.

[74] At the centre of the NQCL is the question of whether Fort McKay First Nation's constitutional right to be consulted extends to applications made under *OSCA* and, if so, is the AER responsible for determining the adequacy of consultation.

[75] On February 4, 2021, we provided recipients of the NQCL the opportunity to address matters related to the NQCL, specifically whether the questions in the NQCL were within our jurisdiction or whether any questions would be more appropriately dealt with by the court.

[76] On February 8, 2021, Alberta submitted the finalized MLAMP. On February 10, counsel for the Solicitor General of Alberta asked that submission dates for the NQCL process be suspended pending determination of the impact of the MLAMP for the hearing. Subsequently, and as outlined in the introduction to this decision, on April 30, Prosper withdrew its application and the hearing was cancelled.

[77] In our January 14, 2021, decision denying the request to reconsider our earlier scoping decision, we acknowledged that Fort McKay First Nation and Prosper each said they would benefit from having clarity from the panel on the issue of the AER as final decision maker for the *OSCA* application. We told the parties that, in our view, the AER is now the final decision maker, and the implications could be dealt with in the context of the redetermination as was initially suggested by Fort McKay First Nation on October 16, 2020.

[78] In these circumstances, we find that it was reasonable for Fort McKay First Nation to file a NQCL.

[79] We note that some of the relief sought in the NQCL was already before us, specifically the question of whether the honour of the Crown was engaged by MLAMP and, if so, would it be in the public interest to approve, deny, or delay the Rigel project. The Court of Appeal had already directed the hearing be reopened for that very purpose so additional submissions on that point in the form of an NQCL were unnecessary.

[80] Fort McKay First Nation was required to file the NQCL at least 14 days in advance of the hearing. The fact they did so on February 1, 2021, a month earlier than required, has no bearing on whether the costs claimed for this item are eligible for an award.

[81] For the reasons set out above, we find that some costs associated with preparation of the NQCL are directly and necessarily related to the proceeding. However, those costs are not readily identifiable and supported by statements containing sufficient detail to calculate a specific award for this element of Fort McKay First Nation's claim for costs. We have incorporated costs associated with this element of the claim into our decision on a reasonable allocation of time and legal resources.

Evidence in Separate Legal Proceedings

[82] Fort McKay First Nation claimed costs for reviewing affidavits and related evidence of Brad Gardiner, President and CEO of Prosper, filed in proceedings in the Court of Queen's Bench. Prosper had filed for an order of mandamus compelling the Alberta Cabinet to decide whether to approve the *OSCA* application. Mr. Gardiner's affidavits address the impacts of the Cabinet delay on Prosper's economic health and prospects.

[83] We conclude that costs associated with reviewing and submitting Mr. Gardiner's affidavits and related evidence were not directly and necessarily related to the redetermination.

Preparation of Andrew Leach Report

[84] The economic benefits of the project were not a factor affected by the Alberta Court of Appeal decision. Furthermore, in our December 2, 2020, decision on the scope of the redetermination, we found that the project's economic impacts were not a matter for the redetermination.

[85] Fort McKay First Nation claimed costs of $8190.00 for an expert opinion report by Dr. Andrew Leach on the economic benefits of the Rigel project. They also claimed professional fees for communicating and consulting with Dr. Leach and reviewing his report. The report was included with a motion to admit new evidence filed by Fort McKay First Nation on February 1, 2021. Prosper pointed out that the panel had in its December 2, 2020, decision letter determined that the project's expected economic benefits were out of scope for the proceeding.

[86] Fort McKay First Nation's invoices include legal fees associated with Dr. Leach's work in the months before our December 2, 2020, scoping decision was issued. We affirmed that decision on January 14, 2021. Throughout December and January there are entries for emails to and from Dr. Leach, telephone meetings with him, drafting an instructions letter to Dr. Leach, and for reviewing his research. Costs for these items are bundled with costs for other tasks. On December 17 and 21, the costs are part of an entry that includes work on the NQCL and email to Prosper's counsel. On January 2, 2021, an entry covers review of Dr. Leach's report and review and research memo on reconsideration scope.

[87] We reviewed the invoice for Dr. Leach's report and note all the activity was conducted after our December 2, 2020, scoping decision in which we clearly said the economic effects of the project were not part of the redetermination. Dr. Leach's work continued after our January 14, 2021, confirmation of the

hearing scope. The costs of $8190.00 for the preparation of his report are not eligible for an award as that evidence was not directly and necessarily related to the issues in the redetermination.

[88] Regarding legal fees associated with Dr. Leach's work, we find it is reasonable for Fort McKay First Nation to have incurred some costs for consulting with Dr. Leach in the lead-up to our scoping decision. However, as with the other categories of costs, we could not ascribe a dollar value to this work. Legal fees for work related to Dr. Leach's area of expertise conducted after December 2, 2020, are not eligible for a cost award.

Are the Costs Claimed for Expenses Reasonable and Necessary?

[89] Fort McKay First Nation claimed costs for internal and third-party printing charges and commissioning services of a third-party law firm for the affidavit of Alvaro Pinto filed in support of their submissions on the MLAMP process.

[90] Prosper acknowledged that *Directive 031* contemplates awards of costs for office disbursements but said that since the proceeding was conducted electronically, Prosper should not have to pay for Fort McKay First Nation's choice to print hard copies of documents.

[91] Prosper noted *Directive 031* states that legal fees include all overhead charges inherent in the normal operation of a law firm. It said commissioning affidavits is an activity conducted in the usual course of a law firm's business and there was no basis for the affidavit of Alvaro Pinto to be commissioned by a law firm in Fort McMurray.

[92] In reply, Fort McKay First Nation said that the protocol for remote commission of affidavits in effect at the time included a requirement for the commissioner and the deponent to each have paper copy of the affidavit, including all exhibits, before them while connected via video.

[93] Fort McKay First Nation defended their decision to print the document and use a third-party commissioner. They said having the affidavit and exhibits printed once, and commissioned in Fort McMurry, was the most cost-effective option – one hard copy was printed instead of two, and one courier charge was incurred instead of two. They also said that cost for a local Commissioner of Oaths to swear the affidavit saved a couple of hours of lawyer's fees.

Views of the AER on Expenses

[94] Reasonable costs associated with printing and commissioning the affidavit are eligible for costs. We will award the cost for printing one copy of the affidavit and the costs of the third-party Commissioner of Oaths to swear the affidavit.

[95] Fort McKay First Nation also claimed disbursements of $421.80 for internal photocopying. *Directive 031* allows us to consider costs for photocopying at $0.10/page. Since the proceeding was held

electronically and since we are unable to ascertain whether the photocopies were of materials relating to matters that were in or out of scope for the proceeding, we find the charge for printing over 4000 pages to be excessive. In the circumstances we find it reasonable to award 150.00 for photocopying.

Decision

[96] Based on the foregoing, for those matters where we were unable to calculate a cost amount to allow, we find that a reasonable allocation of time and legal resources for the redetermination would be 45 hours for a senior lawyer with more than 12 years experience at $350 per hour, and 225 hours of work by a junior lawyer or lawyers at $245 per hour. These hours and fees reflect the costs we decided are not recoverable as described above. They also specifically take into account the novelty and importance of the narrow issue identified in the notice of hearing. Finally, we have also taken into account that Fort McKay First Nation had the lead role in pursuing and making the case in the redetermination and the additional work required to file the NQCL.

Order

[97] The AER hereby orders that Prosper pay costs in the amount of $71 780.81 and GST in the amount $37.79, for a total of $71 818.60. This amount must be paid within 30 days from issuance of this order to

James Coady
Boughton Law Corporation
700 – 595 Burrard Street
Vancouver, BC V7X 1S8

Dated in Calgary, Alberta, on December 13, 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	$135 031.00
Total expenses claimed	$1 177.61
Total GST claimed	$427.79
Total amount claimed	**$136 636.40**
Total fees/honoraria awarded	$70 875.00
Total expenses awarded	$905.81
Total GST awarded	$37.79
Total amount awarded	**$71 818.60**
Reduction	**$64 817.80**

Table 2. Costs claimed and *not* awarded

Andrew Leach hearing costs	$7 800.00
Difference between costs claimed for professional fees and costs awarded	$56 356.00
Difference in expenses	$271.80
Difference in GST	$390.00
Total Reduction	**$64 817.80**