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Provincial Cabinet has prima facie "engaged in unfair and abusive delay"

By: Nigel Bankes

Case Commented On: *Prosper Petroleum Ltd v Her Majesty the Queen in Right of Alberta*, 2020 ABQB 127 (CanLII)

Justice Romaine's oral decision in this matter was released on February 10 and was widely reported in the press. We now have her written memorandum of decision (February 21).

In this case Prosper applied to the Alberta Energy Regulator (AER) for the approval of its Rigel oilsands project under the *Oil Sands Conservation Act*, RSA 2000, c 0-7 (*OGCA*). Under section 10(3)(a) of that Act the AER may approve an oil sands project on any terms and conditions that it considers appropriate if it considers the project to be in the public interest and with "the prior authorization of the Lieutenant Governor in Council".

The AER issued its decision on the application in June 2018, 2018 ABAER 005 and concluded in summary as follows:

> [457] Based on the submissions, evidence, and relevant legislation, Prosper's commitments, and the conditions of approval for each of the applications, the panel has determined the following:
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> - Prosper's Rigel project is in the public interest, taking into account its expected impacts on Aboriginal and treaty rights and traditional land use, its expected social and economic impacts, its impacts on the environment, and its impacts on landowners.
> - Prosper's EPEA application to construct, operate, and reclaim the Rigel project CPF and associated infrastructure is consistent with protecting the environment and promoting sustainable resource development while considering the need for Alberta's economic growth and prosperity.
> - Prosper's Water Act application is consistent with the conservation and wise use of water resources in Alberta, taking into account economic growth and prosperity, the need to maintain a healthy environment, and the effects of the proposed diversion on the aquatic environment.

The provincial cabinet had yet to make a decision on the project at the end of 2019 and accordingly Prosper advised that it would bring an application to compel the cabinet to make a decision – not a decision to green light the project, just a decision one way or another on the project. This was that application.

Justice Romaine concluded that cabinet had an implied duty to make a decision and that it was amenable to a mandatory injunction or an order of mandamus. Cabinet may have a broad

discretion as to the substance of its decision under s 10 of the *OGCA* but it cannot simply fail to make a decision. In determining whether to grant mandatory relief Justice Romaine applied a modified three-part *RJR-MacDonald* test as approved by the Supreme Court of Canada in *R v Canadian Broadcasting Corp*., 2018 SCC 5.

Justice Romaine concluded (at para 39) that Prosper could establish a strong prima facie case if it could establish that the 19 month delay in making a decision was an "abusive delay, that is an abuse of power": *Canada v Addison & Leyen Ltd*, 2007 SCC 33 at para 8. In support of the proposition that the delay was unreasonable Prosper noted that:

> a) On average, Cabinet takes four months to issue a decision under the *Oil Sands Conservation Act*, and the longest period of time (other than for this application) has been seven months.
>
> b) The Premier has characterized lesser delays by the federal government on the much more complicated Trans Mountain Expansion Project as taking too long, even though it required consultation with over 100 Indigenous groups as compared to the three that Prosper was required to consult, two of which do not object to the project.
>
> c) At least two oil sands projects that received an AER decision after Prosper have already received an OIC. Typically, projects receive a decision in the order that they have received AER approval. (at para 43)

While it was clear at some level that the project was highly contested because of the importance of the adjacent Moose Lake area to the Fort McKay First Nation (and with the First Nation having an outstanding appeal of the AER's decision, heard in October 2019), Justice Romaine concluded that absent concrete evidence from the Crown explaining the reasons for the delay, "Prosper has satisfied the onus it bears to establish a strong *prima facie* case that would succeed [at] trial that the Cabinet's delay in making a decision is a breach of its duty under section 10 of the *OSCA*." (at para 51)

Second, Prosper was able to establish irreparable harm on the basis that the Rigel project is its principal asset and that Prosper's very survival was in jeopardy absent a decision. Justice Romaine noted that "The potential of being put out of business is irreparable harm. Prosper notes, and the Crown agrees, that it would not be able to recover the loss it suffers from delay by way of judicial review. Harm that cannot be cured is irreparable harm." (at para 61)

Third, the balance of convenience favoured Prosper. It was true that cabinet had important public interest considerations to take into account but the Crown "has not demonstrated any indication that the delay is due to protecting the public interest, as it has not produced any evidence to demonstrate why the decision has been delayed." (at para 69) One could infer that cabinet's decision was delayed by on-again, off-again negotiations with respect to the management of Moose Lake but the government had previously assured Prosper that projects such as the Rigel Project "could continue through the regulatory process despite the negotiations." (at para 67)

Finally Justice Romaine concluded that Prosper had satisfied the requirements for mandamus (a public legal duty, owed to the applicant, and a clear right to performance of that duty, no other adequate remedy and the remedy will have practical value and effect). Notably, Justice Romaine was of the view that "Cabinet has acted ultra vires its duty in that it has engaged in unfair and abusive delay, without explanation for such delay." (at para 76)

Justice Romaine granted Prosper's application and directed cabinet to make a decision on the project within ten days. The government has appealed this decision and requested a stay of Justice Romaine's order.

The decision is clearly an unusual decision. It is very rare for a court to say anything about cabinet decision-making let alone to issue an order compelling cabinet to make a decision. One might expect this to be especially so where there is evidence that the executive is engaged in difficult and perhaps delicate negotiations with respect to issues that engage the broader public interest; still more so where such issues engage Canada's and Alberta's project of reconciliation with Indigenous communities. Courts need to tread lightly and carefully in these circumstances. On the other hand, an applicant that is not privy to those negotiations should not be hung out to dry, especially where the Crown (at least on the face of this evidentiary record) has encouraged Prosper as the holder of Crown-granted agreements to continue with its application. At the very least the Moose Lake dispute illustrates the problems that can arise when landscape level rules protecting both ecological and Indigenous interests are not put in place *before* Crown dispositions are made and development proposals filed on the basis of those dispositions.

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