

Alberta Court gives Cabinet 10 days to decide on oil sands project

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In reasons for decision issued on February 18, 2020, the Alberta Court of Queen's Bench confirmed in *Prosper Petroleum Ltd v Her Majesty the Queen in Right of Alberta* [PDF] (*Prosper*) that the Alberta Cabinet cannot unreasonably and unjustifiably delay its decision on whether to approve an oil sands project. In *Prosper* [PDF], the Court found an unjustified 19-month delay to be "abusive" and ordered Cabinet to decide within 10 days whether to approve Prosper Petroleum Ltd.'s (Prosper) Rigel Oil Sands Project (the Project).

Background

The Project is a proposed bitumen recovery scheme using steam-assisted gravity drainage to produce up to 10,000 barrels/day. In June 2018, the Alberta Energy Regulator (AER) found the Project to be in the public interest and approved it subject to Cabinet authorization under s. 10(3) of the *Oil Sands Conservation Act* (OSCA), which reserves the final decision to Cabinet.

Nineteen months after the AER decision, Cabinet had not issued its decision or explained to Prosper why a decision could not be issued.

Due to Cabinet's delay, Prosper's business (of which the Project is its primary asset) was on the verge of collapsing without a decision on the Project. Therefore, Prosper brought an application for mandatory interlocutory injunctive relief or *mandamus* directing Cabinet to issue a decision on the Project. Prosper did not seek an order directing Cabinet to approve the Project; rather, it only sought an order that Cabinet decide, one way or another.

The Court of Queen's Bench decision

Madam Justice Romaine of the Court of Queen's Bench ordered Cabinet to decide on the Project within 10 days, granting both mandatory interlocutory injunctive relief and *mandamus*.

In doing so, Justice Romaine rejected the Government of Alberta's arguments that Cabinet is immune from mandatory court orders generally or when exercising an absolute and unfettered discretion. Justice Romaine found that Cabinet's decision-making power under the OSCA includes an implied duty to decide. Further, Justice Romaine distinguished between Cabinet's discretion over the content of its decision and the requirement to decide. If Cabinet never decided, it would render its decision-making powers meaningless.

Justice Romaine then applied the modified three-part test for mandatory interlocutory injunctions, finding that Prosper meet each element:

- **Strong *prima facie* case:** Prosper established a strong *prima facie* case that 19 months of delay breached Cabinet's duty to decide within a reasonable period. Indeed, on average, Cabinet takes four months following an AER hearing to decide whether to approve a project and, prior to the Project, Cabinet had not taken more than seven months to decide.
- **Irreparable harm:** Prosper demonstrated a meaningful risk of irreparable harm, including that the company will not be able to continue to pay its costs without incoming revenue and that its survival is in jeopardy. Moreover, any further delay risked Prosper losing out on a third winter drilling season. These are losses that Prosper cannot recover from the Government of Alberta on judicial review.
- **Balance of convenience:** Finally, Justice Romaine found that the balance of convenience favoured Prosper because the Government of Alberta did not demonstrate any indication that its delay was to protect the public interest. On the other hand, there is a strong public interest in encouraging a timely Cabinet decision.

Justice Romaine also found that Prosper met the test for an urgent order in the nature of *mandamus*. Here, Cabinet owed a public legal duty to Prosper to issue a decision on the Project. However, notwithstanding Prosper's many direct pleas for a decision or explanation for the delay, Cabinet did not provide either. In the circumstances, the delay was "unfair and abusive". Prosper had no other adequate remedy available to it and, on the balance of convenience, *mandamus* must issue.

Court of Appeal stay

The Government of Alberta immediately appealed the decision to the Court of Appeal. On February 26, Madam Justice Strekaf [stayed the Court of Queen's Bench order \[PDF\]](#) on the basis that the appeal would otherwise be rendered nugatory. To reduce the risk of harm to Prosper, Justice Strekaf set the matter down for an expedited appeal hearing.

Impact of the case on project proponents

The Court of Queen's Bench decision confirms important principles that, if upheld on appeal, will provide much-needed legal certainty for project proponents.

First, all authorities exercising decision-making powers under statute must decide within a typical or reasonable time or provide a compelling explanation to justify their delay. Second, where delay is atypical, the courts will scrutinize the decision and protect the rights of proponents to a decision within a typical or reasonable time period. For proponents, the decision provides comfort that after investing millions of dollars in the regulatory process, Cabinet cannot arbitrarily or unreasonably delay a decision on a project that has completed the regulatory review process.

*Prosper was [represented](#) at both the Court of Queen's Bench and Court of Appeal by Sander Duncanson, Sean Sutherland and Maureen Killoran, QC.