



**Mackenzie Valley Land and Water Board**  
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March 29, 2018

File: MV2011L4-0002

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**Motion for Costs - Denied**  
**Taltson Twin Gorges Hydroelectric Generating Station, NT**

The Mackenzie Valley Land and Water Board (MVLWB or the Board) received a Motion for Costs submitted by Carter Family's Legal Counsel on January 26, 2018. Both parties were invited to provide comments regarding the Motion for Costs, including applicable legislation and rules, and the specific jurisdiction of the Board to award costs of this nature and at this stage. The Board also provided an opportunity for both parties to comment on the Motion process set out; neither party expressed any concerns with the process set out by the Board.

The Board hereby denies the application for lack of Board jurisdiction to order costs as described in the Reasons for Decision (attached).

If you have any questions or concerns, please contact Jacqueline Ho at (867) 766 7465 or email [jho@mvlwb.com](mailto:jho@mvlwb.com).

Yours sincerely,

A handwritten signature in blue ink, appearing to read "Mavis Cli-Michaud".

Mavis Cli-Michaud  
MVLWB, Chair

Copied to: Caroline Wawzonek & Sheldon Toner, Counsel for MVLWB  
Matthew Miller, NTPC

Attached: Reasons for Decision



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## Reasons for Decision

Issued pursuant to section 54 of the *Waters Act*  
section 72.25 of the *Mackenzie Valley Resource Management Act (MVRMA)*,

Motion for Costs	
Preliminary Screener	MVLWB
Reference/File Number	MV2011L4-0002
Applicant	Northwest Territories Power Corporation
Project	Taltson Twin Gorges Hydroelectric Generating Station, NT

### Decision from Mackenzie Valley Land and Water Board

Meeting of

March 29, 2018

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These Reasons for Decision describe the Mackenzie Valley Land and Water Board's (the MVLWB or the Board) regulatory process and set out the Board's decision on the Motion for Costs made by the Carter Family to the Board on January 26, 2018 for Northwest Territories Power Corporation (NTPC)'s Water Licence (Licence) MV2011L4-0002. The Motion for Costs made by the Carter Family is to request the Board to order NTPC to pay the costs incurred for the Claim for Compensation.

## **1 Background**

On September 5, 2017, the Carter Family's legal counsel submitted an application for costs with respect to the Carter Family's Claim for Compensation. As the application for costs was submitted prior to the Minister's decision, the Board provided direction to the Carter Family's legal counsel on September 15, 2017 to resubmit the request following the Minister's decision, and to provide reference to applicable legislation and rules, including the specific jurisdiction of the Board to award costs. After the Minister's approval of the Licence on November 8, 2017, the Carter Family's legal counsel submitted a Motion for Costs on January 26, 2018 to request that the Board order NTPC to pay the costs incurred for the Claim for Compensation.

On February 1, 2018, the Board set out a process to consider the Motion for Costs, in keeping with its Rules of Procedure. Both parties were invited to provide comments regarding the Motion for Costs, including applicable legislation and rules, and the specific jurisdiction of the Board to award costs of this nature and at this stage. NTPC's comments were received February 15, 2018, and Carter Family's response to NTPC's comments were received February 21, 2018. The Board also provided an opportunity for both parties to comment on the process set out by the Board to consider the Motion; neither party expressed any concerns with the process.

## **2 Legislation Regarding Award of Costs**

### **2.1 Express or Implied Jurisdiction over Costs**

As with all other decisions of the Board, the Board's authority to issue an order for costs depends on whether or not the Board's enabling legislation provides the jurisdiction to make such an order<sup>1</sup>.

In the absence of express language in the legislation granting a certain power, a Board can exercise that power only if its existence can be implied from the legislation. Implied jurisdiction requires an examination of the language of the legislation to determine whether the power at issue is in compliance with the Board's other powers and, most importantly, is an authority or power necessary in order for the Board to achieve its fundamental purposes and objectives.

The power to grant a party costs has historically been a power that could only come from legislation and not by implication. Even courts do not have any implied or inherent jurisdiction to order costs unless their own enabling legislation provides for that power<sup>2</sup>.

### **2.2 Jurisdiction of the MVLWB to Order Costs**

#### **Express Power**

Neither the *Waters Act* nor the *Mackenzie Valley Resource Management Act* (MVRMA) have any provisions applying to the MVLWB that expressly provide proponents or interveners a right to receive costs.

There is some mention of costs-like powers but only in relation to costs payable to the Minister or limited to the Inuvialuit Water Board (IWB). For example, section 58 of the *Waters Act* allows the IWB to issue an order for cost recovery by the Minister against "an applicant or a licensee" for amounts or

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<sup>1</sup> *Halifax Regional Municipality v. The Nova Scotia Human Rights Commission and Kirk Johnson*, 2005 NSCA 70 at para 25 citing *Re: Labour Relations Board (Nova Scotia) v. Digby Municipal School Board et al* (1982), 52 NSR (2d) 81 (affirmed by the Supreme Court of Canada at [1983] 2 SCR 311) at 592

<sup>2</sup> *Ibid*, at para 23 citing *Nova Scotia (Minister of Community Services) v. Elliott (Guardian ad litem of)*, [1995] N.S.J. NO. 150 at para 7

services prescribed by the regulations. Of note, there are no set amounts or services yet prescribed by any of the associated regulations.

#### Implied Power: Objects and Purposes of the Board

Section 24 of the *Waters Act* outlines the objectives of the Board, “to provide for the conservation, development and utilization of waters in a manner that will provide the optimum benefit for all Canadians...”. This section mirrors the objectives set out in section 101.1 of the MVRMA. As will be discussed further below, compensation does not form part of these sections.

### **2.3 Cost Awards in the Context of Other Environmental Regulatory Boards**

By contrast to the silence of the *Waters Act* and MVRMA regarding the awarding of costs, other environmental regulatory boards have express provisions in their enabling statutes giving them jurisdiction to order costs.

For example, the Alberta Surface Rights Board has express jurisdiction set out in the Alberta *Surface Rights Act* not only over the costs associated with proceedings in front of the board but also in relation to any “preliminary costs of the respondent necessarily incurred in reaching a decision whether to accept the compensation offered by the operator”.<sup>3</sup> In other words, these would be costs associated with a non-proponent needing to seek legal or financial advice whether a compensation proposal from a proponent is reasonable, rather than applying through that board.

The British Columbia Surface Rights Board also has express jurisdiction to order costs including: actual reasonable legal fees and disbursements, actual reasonable fees and disbursements of a professional agent or expert witness, other actual reasonable expenses incurred by a party and an amount to reflect the time that the party themselves may spend in preparation of a hearing. That board may also grant advance costs to a landholder in an amount that the board anticipates “will be the landholder’s actual costs” of participating at a hearing.<sup>4</sup>

One rationale identified by courts in support of these orders when challenged is that they help ensure a landowner is not out of pocket when attempting to enforce their rights, particularly when considering the strong likelihood that the proponent has a significant financial advantage. However, such cost orders must still remain within the jurisdiction granted.

### **3 Regulatory Process**

The Board set out a process to allow both parties to make comments on the Motion for Costs. On February 15, 2018, NTPC provided its response and on February 21, 2018, the Carter Family provided comments regarding the Motion for Costs. A summary of the positions of the parties is provided below.

#### **3.1 Carter Family**

The Carter Family is seeking to be “compensated for the costs incurred to advance [their] meritorious Claim for Compensation.”

The Carter Family begins their argument by noting that the costs at issue were incurred “as a direct result of NTPC’s application for a Licence renewal in 2011.” The Carter Family suggests that the reason for the

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<sup>3</sup> *Surface Rights Act*, RSA 2000, C. S-24 at s. 39

<sup>4</sup> *Petroleum and Natural Gas Act*, RSBC 1996, C. 361 at s. 168-170

high legal and external costs was due to the complexity of the legislative scheme and adversarial nature of the Board process that necessitated legal counsel. The Carters add that there is a lack of clarity in the legislation generally and particularly over whether past losses are compensable so that by the time they were given the decision on this issue, costs had to be incurred in order for them to make their arguments. They also pointed to a need for the process to be accessible to members of the public as well as timely and cost-effective, suggesting that a lack therefore forced their costs to be higher.

The Carter Family appears to be seeking all costs from both the 2012 and 2017 hearings. In paragraph 22 of their initial submission, the Carters note that “through no fault of the Carter Family, a second hearing was required, which meant that significant additional time and expense had to be spent” (emphasis added). This implies that the earlier costs were added to and that it is now the entirety that is being claimed.

The Schedule of costs forming part of their initial submission provided no details, explanations or dates to explain any of the \$227,044.92 of legal fees being sought. The costs claimed for the Kingston Ross Pasnak LLP economic report and expert evidence is presumably for work done both in 2012 and 2017, but no details or dates were provided.

### **3.2 NPTC Position**

NTPC asked to have the Carter application for costs dismissed entirely.

NTPC argued primarily that there is no legislative or common law authority to give the Board the jurisdiction to order costs. NTPC noted that this was already the finding of the Board in the original 2012 decision and that this aspect of the 2012 decision was not challenged in the judicial review.

Although maintaining that there is no jurisdiction to order costs, NTPC also responded to the substance of the claim. NTPC argued that Schedule A of the costs application gives insufficient information on which to assess the reasonableness of the claim. In addition, NTPC asserted that any aspect of the claim relating to the Judicial Review process could not be included since it was addressed in the court of proceedings before the Supreme Court. Finally, NTPC argued that they were in fact the substantially successful party when looking at the issues as a whole and therefore they ought not to be responsible to pay a costs award.

## **4 Board Decision**

The Board carefully reviewed all written submissions from the Carter Family and NTPC and considered the legislative context including the purpose, scope and intent of the MVRMA and the *Waters Act* and the regulations made thereunder. For the reasons described herein, the Board has determined that although costs may have been reasonably incurred by the Carter Family throughout the compensation claim process, the Motion for Costs must be denied due to lack of Board jurisdiction to make such an order.

### **Express Jurisdiction**

The Board first considered whether its enabling legislation included any express power to include an order for costs when it determines that compensation should be paid by a licensee applicant.

In its submissions, NTPC asserts that that there are no such express provisions in applicable legislation. The Carter Family does not point to any express jurisdiction of the Board to make the order as requested but does discuss the complexity of the enabling legislation.

Neither the *Waters Act* nor the *MVRMA* have any provisions applying to the MVLWB that expressly provide either proponents or interveners a right to receive costs. There are sections that establish powers to issue orders similar to that at issue but only in relation to costs payable to the Minister or limited to the Inuvialuit Water Board (IWB). For example, section 58 of the *Waters Act* allows the IWB to issue an order for cost recovery by the Minister against “an applicant or a licensee” for amounts or services prescribed by the regulations. This provision does not apply to the Mackenzie Valley Land and Board.

The Board also considered the powers granted to a board under the *Public Inquiries Act*. The *Public Inquiries Act* gives the Board all of the powers of a court to summon witnesses and documents, administer oaths and control access of interested parties and the public to the hearing. There is no express authority granted in that Act to order costs against any party.

### Implied Jurisdiction

The Board next considered whether there could be an implied jurisdiction to make an order for costs. The Board embarked on this effort acknowledging that the power to grant a party costs has historically been one that could only come from legislation and not by implication<sup>5</sup>.

NTPC argues that an administrative tribunal cannot order costs to a party absence express statutory authority. It also argues in the alternative against any interpretation of the *Waters Act* that would support an implied authority. It observes, first, that other sections of the relevant legislation speak to costs in contexts not applicable to the compensation claim process and, second, that there is no evidence of any legislative intention to vest the Board with this power.

The Carter Family does not argue that the Board has an implied authority to order costs but describes in detail the reasonableness of their decision to engage legal and other professional services. It may be that the Carter Family is inferring that the authority to order costs is implied from what they describe as the complex nature of the legislative process as it exists for anyone seeking compensation. Out of caution, the Board did consider the possibility of an implied authority.

Section 24 of the *Waters Act* outlines the objectives of the Board, “to provide for the conservation, development and utilization of waters in a manner that will provide the optimum benefit for all Canadians...”. This section mirrors the objectives set out in section 101.1 of the *MVRMA*. Compensation does not form part of these sections. The language in section 24 is clear and the stated purposes are not directly related to compensation for competing uses of waters. In addition, the Board acknowledges that it has a variety of legislated tools at its disposal to accomplish these objectives including, for example, the power in section 27 to establish conditions in a license including those that may “minimize adverse effects.” After considering the language of section 24 of the *Waters Act*, the Board decided the authority to order costs is not necessary in order for the Board to achieve its fundamental purposes and objectives.

The Board also compared the language in its enabling legislation to that of other environmental regulatory boards that have the express jurisdiction to award costs such as the Alberta Surface Rights Board and the British Columbia Surface Rights Board, both discussed above. In addition, the Board considered the language in subsection 28(4) that enables the Nunavut Water Board to consider orders for the payment of costs “incurred by the designated Inuit organization.” All of these examples confirm to the Board that an

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<sup>5</sup> *Halifax Regional Municipality v. The Nova Scotia Human Rights Commission and Kirk Johnson*, 2005 NSCA 70, at para 23 citing *Nova Scotia (Minister of Community Services) v. Elliott (Guardian ad litem of)*, [1995] N.S.J. NO. 150 at para 7

express authority to order costs could easily be provided and need not be implied in order to accomplish similar regulatory goals.

SIGNATURE

Mackenzie Valley Land and Water Board

  
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Mavis Cli-Michaud, Chair

March 29, 2018  
\_\_\_\_\_  
Date