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Staff Report

Applicant: Northwest Territories Power Corporation (NTPC) and the Carter Family	
Location: Nonacho Lake, NT	Application: MV2011L4-0002
Date Prepared: March 20, 2018	Meeting Date: March 29, 2018
Subject: Carter Family Motion for Costs - Taltson Compensation Claim Re-Hearing	

1. Purpose/Report Summary

The purpose of this Report is to present to the Mackenzie Valley Land and Water Board (MVLWB/the Board) a Motion for Costs submitted by legal counsel for the Carter Family on January 26, 2018. The Motion for Costs is associated with the Taltson Compensation Claim Re-Hearing for Water Licence MV2011L4-0002 and is submitted for Board Decision.

2. Background

- August 10, 2017 – Board Recommended Approval of Updated Type A Water Licence and Reasons for Decision;
- September 5, 2017 – Application for costs from the Carter Family’s legal counsel received;
- September 15, 2017 – the Board directed Carter Family’s legal counsel to resubmit application for costs, with detailed rationale, following the Minister’s decision;
- November 8, 2017 – Minister approved the Updated Type A Water Licence and Reasons for Decision;
- January 26, 2018 – Motion for Costs from Carter Family’s legal counsel received;
- February 1, 2018 – the Board established a process for addressing the Motion for Costs, including requesting comments from both parties;
- February 15, 2018 – NTPC’s comments received;
- February 21, 2018 – Carter Family’s sur-reply received; and
- **March 29, 2018 – Motion for Costs presented to the Board for decision.**

3. Discussion

Project Description

Between 1963 and 1968, the Taltson Twin Gorges Hydroelectric Generating Station (Taltson Hydro Facility) was built to provide power to the Pine Point Mine, which closed in 1986. Since 1986, the Taltson Hydro Facility has provided power to a number of communities in the Northwest Territories (NT), including Hay River, Hay River Reserve, Fort Smith, Fort Resolution, and Enterprise.

Regulatory Procedural History

This section summarizes the regulatory history of the file starting from the 2011 Licence Renewal Application, the associated Claim for Compensation, and the subsequent Re-Hearing. The detailed description of NTPC's earlier issuance is available in the Reasons for Decision dated August 10, 2017¹.

During NTPC's Licence renewal process in 2011, the Carter Family filed a Claim for Compensation². After a series of licensing proceedings, including Technical Session, Written Interventions, Public Hearings, and Information Requests, the Board recommended approval of Licence MV2011L4-0002 on May 3, 2012 upon payment of compensation for nuisance and inconvenience in the amount of \$62,500.

On June 25, 2012, the Carter Family filed for judicial review of the Board's decision, which was heard by Supreme Court of the Northwest Territories on August 14, 2013. On March 7, 2014, Justice Shaner ordered the matter of compensation to be remitted to the Board for further consideration³.

Prior to the Re-Hearing, a process was developed to ensure procedural fairness, in keeping with the Board's Rules of Procedure⁴, and the direction of Justice Shaner in *Carter v. NTPC*. On May 16, and 17, 2017, the Re-Hearing for the Carter Family's Claim for Compensation was held by the Board. On August 10, 2017, the Board recommended approval of the updated Licence upon a payment of compensation in the amount of \$100,000. The Minister approved the updated Licence on November 8, 2017⁵.

Motion for Costs Submission Description and Review Process

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 (attached) 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 (see attached), 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 Motion process set out; neither party expressed any concerns with the process set out by the Board.

¹ See MVLWB Public Registry (www.mvlwb.com). [Update to Type A Water Licence and RFD](#). August 10, 2017.

² See MVLWB Public Registry (www.mvlwb.com). [Notice of Intervention and Claim for Compensation](#) September 2, 2011.

³ See Northwest Territories Courts Decisions. [Reasons for Judgement](#). March 7, 2014.

⁴ See MVLWB website (www.mvlwb.com). [Rules of Procedure Including Public Hearings](#). January 14, 2004.

⁵ See MVLWB Public Registry (www.mvlwb.com). [Minister Approval Letter](#). November 8, 2017.

4. Comments

What are “Costs” in a Legal Proceeding?

In litigation, “costs” are all or some of the fees associated with having a lawyer prosecute or defend a case. Costs may include disbursements such as expert fees, printing and court fees.

In superior court proceedings, the legal expression “costs follow the event” means that a successful party can apply to the presiding judge for an order to have the losing party pay part of its costs. Generally, in Canada and particularly in the Northwest Territories, an order for “costs” rarely means an order that covers a party’s actual costs. In the Northwest Territories, there is a schedule of costs appended to the Civil Rules of Court that establishes what steps may be compensated for and the assigned value of each. The scheduled amount varies based on the total value of the litigation. Only in exceptional cases will the successful party get an order in an amount higher than what would be purely derived from the schedule; such as cases where the parties have a pre-existing contract agreeing to a higher rate (such as mortgage contracts) or in cases of vexatious conduct by the losing party.

In addition to listing the items in the schedule that they believe applicable, the applying party will also usually provide a detailed list of disbursements. Reasonable disbursements are usually covered in full.

Express or Implied Jurisdiction over Costs

As with all other decisions of the Board, the Board’s authority to issue an order for costs will depend on whether or not the Board’s enabling legislation provides the jurisdiction to make such an order⁶.

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 power⁷.

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.

In the case of a public hearing, the Board has all of the powers of a board described in the *Public Inquiries Act*. The *Public Inquiries Act* gives the Board all of the powers of a court to summon witnesses

⁶ *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

⁷ *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

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 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. Compensation does not form part of these sections.

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”.⁸ 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.⁹

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.

5. Reviewer Comments

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’s legal counsel provided comments regarding the Motion for Costs. A summary of the positions of the parties is provided below.

Carter Family

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

⁸ *Surface Rights Act*, RSA 2000, C. S-24 at s. 39

⁹ *Petroleum and Natural Gas Act*, RSBC 1996, C. 361 at s. 168-170

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 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 point 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 thereof 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 the Motion for Costs, 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 the costs of the Re-Hearing and that that is now the total being claimed.

The Schedule of costs in the Carter Family Motion for Costs provides no details, explanations or dates for the requested \$227,044.92 in legal fees. The costs claimed for the Kingston Ross Pasnak LLP economic report and expert evidence are presumably for work done both in 2012 and 2017 but no details or dates are provided.

NTPC

The NTPC asks to have the Carter Family Motion for Costs dismissed entirely.

The NTPC argues primarily that there is no legislative or common law authority to give the Board the jurisdiction to order costs. The NTPC notes 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, the NTPC also responds to the substance of the claim. The NTPC argues that Schedule A of the Motion for Costs gives insufficient information on which to assess the reasonableness of the claim. In addition, the NTPC asserts that any aspect of the claim relating to the Judicial Review process cannot be included since it was addressed in the court proceedings before the Supreme Court. Finally, the NTPC argues 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.

6. Security

Not applicable.

7. Conclusion

The Board can consider the following questions to make a decision on the Motion for Costs:

- a. Does the Board have express jurisdiction to order costs?
- b. Must the Board have implied jurisdiction to order costs in order to complete its express mandate?
- c. Subject to the answers above, was the claimant successful in at least some of their claims?

- d. Subject to the answers above, are the costs that are being claimed reasonable in the circumstances of the case?
- e. Is there any policy reason to grant the claim for costs? (for example, did the NTPC prolong the process or act inappropriately?)
- f. Subject to the answers above, is an award for partial costs reasonable?

8. Recommendation

Board staff have prepared the following options for the Board's consideration:

- A. Make a motion to deny the application for lack of express or implied jurisdiction; OR
- B. Make a motion to deny the application for being unmeritorious and unreasonable; OR
- C. Make a motion to order reasonable costs; OR
- D. Make another decision.

9. Attachments

- [Motion for Costs](#)
- [Board Letter to the Parties re: Motion for Costs](#)
- [NTPC Response to Motion for Costs](#)
- [Carter Family Response re: Motion for Costs](#)

Respectfully submitted,



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