

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

JEAN CARTER, MYLES CARTER, DEAN CARTER, AND KANDEE
FROESE, ON THEIR OWN BEHALF AND ON BEHALF OF THEIR SPOUSES
AND CHILDREN, AND THE NONACHO LAKE FISHING CAMP

Applicants

-and-

NORTHWEST TERRITORIES POWER CORPORATION AND THE
MACKENZIE VALLEY LAND AND WATER BOARD

Respondents

Judicial Review of the Decision of the Mackenzie Valley Land and Water Board

Heard at Yellowknife, NT, on August 14, 2013.

Reasons filed: March 7, 2014

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE K. SHANER

Counsel for the Applicant:

E. Olszewski

Counsel for the Respondent

Northwest Territories Power Corp:

J. Rossall

Counsel for the Respondent

Mackenzie Valley Land and Water Board:

J. Hope-Ross

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REASONS FOR JUDGMENT

[1] The Applicants seek judicial review of a decision rendered by the Mackenzie Valley Land and Water Board on May 24, 2012.

I. BACKGROUND

[2] The Mackenzie Valley Land and Water Board (the “Board”) is constituted under the *Mackenzie Valley Resource Management Act*, SC 1998, c 25 and, among other things, hears applications for and may issue Type “A” water licences under the *Northwest Territories Waters Act*, SC 1992, c 39.

[3] The licences are subject to approval by the federal Minister of Indian Affairs and Northern Development (the “Minister”), pursuant to s. 81 of the *Mackenzie Valley Resource Management Act*.

[4] Section 14 of the *Northwest Territories Waters Act* recognizes that other water users may be adversely affected by a proposed use and accordingly, before

the Board can issue a Type “A” water licence, it must be satisfied that compensation in an amount the Board considers appropriate has been or will be paid to adversely affected parties. The Board may also impose specific conditions on a licensee to mitigate future damage.

[5] On June 3, 2011, the Northwest Territories Power Corporation (“NTPC”) applied to the Board to renew a Type “A” water licence relating to its Taltson Hydro Electric Facility.

[6] The individual applicants, Jean Carter, Myles Carter, Dean Carter and Kandee Froese, (the “Carters”) operate a fishing camp on Nonacho Lake in the Mackenzie Valley in the Northwest Territories. They filed a Notice of Intervention and Claim for Compensation with the Board on September 2, 2011, in which they sought compensation for past and future economic losses to the business. They also sought compensation for harm to their enjoyment of life, stemming from NTPC’s past and proposed activities.

[7] Following public hearings, the Board decided to issue a water licence to NTPC. In its reasons of November 24, 2011 it found that the Carters would be adversely affected by the activities proposed by NTPC and imposed a number of conditions on the licence. These included a requirement that NTPC “determine the nature and extent of the adverse effects its operations shall have on the . . . Carter Family” and a direction to NTPC to submit a report to the Board detailing the adverse effects on the Carters and its mitigation plan. (*Record*, Tab 206).

[8] The Board sent its Reasons for Decision and draft licence to the Minister on November 29, 2011.

[9] On December 12, 2011, the Minister declined to approve the licence as presented, reasoning that it was the Board, rather than NTPC, which must determine the amount of compensation that should be paid as a result of adverse effects.

[10] The Board chose to gather the evidence it required to determine appropriate compensation for adverse effects through “Information Requests”. The Board’s *Rules of Procedure*, (the “*Rules*”) created under the authority of s. 30 of the *Mackenzie Valley Resource Management Act*, describe an Information Request as a written request for information or particulars from the Board to a party or from one party to another as well. The *Rules* also set out the process to be followed when Information Requests are used.

[11] The Board sent the Information Request to the Carters on December 20, 2011. It read, in part, as follows:

The Board has determined that the Carter family and the Deninue Kue First Nation (DKFN) are entitled to compensation in this case because they would be adversely affected in the future by the use of waters in NTPC's operations under the water licence as per paragraph 14(4)(b) of the *Northwest Territories Waters Act*. However, the Board has been asked to determine the appropriate amount of compensation to be paid to each of these applicants prior to the issuance of a renewal licence.

* * *

In order for the Board to make a determination of the nature and amount of compensation, please answer the following questions in as much detail as possible:

- What costs or damages have you suffered to date? (Give details and indicate how you have come to any estimates of damages).
- Do you own any property along the water course affected by the proposed WL? If so, what is the nature of your property interest and the use you make of it? Indicate how long you've held this property interest.
- Do you have any outfitting, trapping, or other interest in the area affected? What is the nature of your interest, and the use you make of it? Describe this interest and indicate how long you have held this interest.
- Have you taken any steps to avoid or mitigate the effects described above?
- What costs or damages would you expect to suffer on an ongoing basis if the proposed WL is approved? (Give details and indicate how you have come to any estimates of damages).
- Have you applied for or are you collecting compensation from any other source? (Give details).
- If compensation is to be awarded by the Board, do you have a preference in terms of the form of payment? (lump sum, periodic payment, in kind, another form)
- Is there any other information you can provide to assist the Water Board in making a decision on your claim?

* * *

Please note that the Board will consider your response to determine the appropriate amount of compensation to be paid to the Carter family for the term of the Water Licence. Claims for past adverse effects will not be considered. Please also remember that the onus is upon the Carter Family to prove that they are indeed entitled to compensation and to quantify the amounts and form that compensation should take.

The Licensee will have until March 12, 2012 to provide their responses to your detailed compensation claim.

Record, Tab 212

[12] On February 21, 2012 the Deninu K'ue First Nation, another party in the licencing proceedings, wrote to the Board's chairperson seeking clarification on a number of issues. One of these was with respect to the Board's use of information respecting past adverse effects, as follows:

While the Board explicitly states that it will not consider past adverse impacts of the Talston [*sic*] Dam on the DKFN, the Board also asks DKFN to indicate what costs or damages DFKN [*sic*] or its members have suffered to date. The Board asks additional "backward looking" questions such as how long the DKFN has had interests in the affected area, and what steps the DKFN has taken to avoid or mitigate the effects . . . We also note the general difficulty in separating an assessment of damages arising from the original construction and past licensing, from the current effects of the ongoing operation in the Dam. We therefore request clarification from the Board as to the use of information pertaining to pre and post license [*sic*] periods in respect of the Board's assessment of the nature and amount of compensation the DKFN may be entitled to under the *Water Act*.

Record, Tab 223, p. 4

[13] The Board's chairperson responded by letter dated March 1, 2012, stating "The *Northwest Territories Waters Act* speaks for itself. Parties are entirely free to express their understanding of legislation and regulation. The Board would consider such arguments as appropriate". *Record, Tab 230.*

[14] The Carters submitted an extensive response to the Information Request in which, among other things, they identified and sought compensation for both past and future loss of income and past and future out-of-pocket expenses in the amount of \$5,690,621.00. This was based largely on an assessment and valuation report prepared by a professional accountant.

[15] In arriving at this figure, the accountant considered a number of factors, including past and projected patronage, past and projected out-of-pocket expenses to replace docks and clear debris, and future estimated remediation costs resulting from the impact of the water use on the continued viability of the fishing lodge.

[16] The Carters' response also identified damages for nuisance, inconvenience and loss of lifestyle in the additional amount of \$575,000.00. These were assessed by the Carters' legal counsel. The methodology used by their lawyer in arriving at this figure was provided.

[17] Finally, the response included legal submissions in support of the Carters' position that the Board could award compensation for past losses as well as future ones.

[18] NTPC provided its response to the Carters' submissions on April 23, 2012. It, too, was extensive and included two lengthy expert reports: one that reviewed the Carters' claim that NTPC's operations caused adverse aquatic effects in Nonacho Lake and one from an accounting firm, which examined the valuation and quantification of damages prepared by the Carters' accountant. NTPC's accounting expert opined that the Carters' accountant employed flawed methodologies in arriving at his conclusions. Both reports reached different conclusions than the Carters respecting the extent of adverse effects.

[19] The Carters asked for an opportunity to reply to NTPC's submissions, but the Board denied the request. It informed the Carters of this by letter dated May 3, 2012.

[20] The Board rendered its reasons for decision on the licence, including the compensation to be paid to the Carters, on May 24, 2012. The decision and the proposed licence were transmitted to the Minister by letter of the same date.

[21] The Board did not award the Carters any damages for past adverse effects, that is, adverse effects arising under previous licences, nor did it award compensation for future loss or damage, finding the Carters provided insufficient proof to support their claim for compensation for economic losses. However, it awarded them compensation for nuisance and inconvenience in the amount of \$62,500.00.

[22] The Minister approved the licence and advised the Board of this by letter dated July 26, 2012.

II. ISSUES

[23] The issues are:

1. Who are the proper applicants?
2. Did the Board make improper submissions to this Court in these proceedings and, if so, does this limit the potential remedies in any way?
3. What is the appropriate standard of review?
4. Were the Carters denied procedural fairness before the Board?
5. Does the Board have authority to award compensation for past adverse effects?
6. Did the Board err in its decision on compensation for future adverse effects?

1. Who Are the Proper Applicants?

[24] The individual applicants, namely, Jean Carter, Myles Carter, Dean Carter and Kandee Froese participated in the proceedings before the Board. The Board referred to them collectively as the “Carter Family”.

[25] The style of cause in the proceedings before this Court indicates that the individual Carters bring this application on their own behalf, as well as on behalf of their spouses and children and the Nonacho Lake Fishing Camp. The spouses, children and fishing camp were not, however, participants in the proceedings before the Board and there was no request made on their behalf for standing in this judicial review application.

[26] The unnamed spouses and children and the Nonacho Lake Fishing Camp have no standing and none of the relief granted or other consequences of this decision will attach to them.

2. Did the Board make improper submissions to this Court in these proceedings and, if so, does this limit the potential remedies in any way?

[27] The Board appeared in these proceedings through its counsel for the purpose of making submissions on matters of pure jurisdiction and addressing questions about the record, if any. The Carters and NTPC agreed that the Board could also make submissions on the appropriate standard of review.

[28] After the Board filed its submissions, the Carters expressed concern that some of the Board's written arguments went beyond these three areas and into the merits of the decision under review.

[29] Traditionally, tribunals have been limited to making submissions on matters of jurisdiction and clarifying the record: *Northwestern Utilities Ltd. v. Edmonton (City)*, [1979] 1 SCR 684.

[30] In *Leon's Furniture Limited v. Alberta (Information and Privacy Commissioner)*, 2011 ABCA 94, Slatter, J.A., recognized that this position has evolved with changes in the law respecting judicial review and the recognition that administrative decision makers may offer helpful insight into the extent of their expertise or provide a response to a legal argument that would otherwise go unanswered. Accordingly, the appropriate role for a tribunal on judicial review will be determined by balancing a number of considerations. (*Leon's Furniture Limited*, paras 16-30).

[31] While finding some tribunals may properly play a more extensive role in judicial review proceedings, Slatter, J.A., noted that in most cases where the tribunal under review has an adjudicative function, deciding issues and affecting the rights and interests of two or more parties with divergent positions, the model set out in *Northwestern Utilities Ltd.* will be the appropriate one:

[28] I agree that the law should acknowledge the multifaceted roles of many modern administrative tribunals, and the realities of the situation. The *Northwestern Utilities* case should be used as a "source of the fundamental considerations". Its principle will often be applied with full vigour to administrative tribunals that are exercising adjudicative functions, where two adverse parties are present and participating. While the involvement of a tribunal should always be measured, there should be no absolute prohibition on them providing submissions to the court. Whether the tribunal will be allowed to participate, and the extent to which it should participate involves the balancing of a number of considerations.

[32] The *Northwestern Utilities Ltd.* model should govern the Board's participation in this case. The Board may well perform some policy functions but in this context, being the determination of appropriate compensation to be paid by a licensee to another water user, its role is primarily an adjudicative one. Thus, the Board's role before the Court is limited to making submissions on jurisdiction, the record and the standard of review and it is within this framework that the appropriateness of the Board's submissions must be assessed.

[33] The Carters' specific concerns with the Board's submissions are each identified and addressed below:

a. *The Board's Submission that it Followed its Own Rules*

[34] The Board states at paragraph 21 of its brief that it followed its own *Rules*¹ when it decided to use the Information Request process including its determination that NTPC would be the last party to make submissions.

[35] Whether the Board did, in fact, follow its *Rules*, and in particular, if it did so properly, is related directly to a central issue in this judicial review: whether the Board denied the Carters the required degree of procedural fairness.

[36] This question is neither a matter of pure jurisdiction (in the sense of the Board's authority to do something), nor an issue with the record requiring clarification. The Board's submissions on this point amount to an argument on the merits of its decision to deny the Carters' request to reply to the materials and evidence submitted by NTPC in response to the Information Request. Accordingly, they are improper and they have been given no weight.

b. *The Board's Submissions on the Interpretation of s. 14(4)(b) of the Northwest Territories Waters Act*

[37] In paragraphs 28 and 29 of its brief, the Board seeks to clarify what it appears to have understood to be the Carters' erroneous interpretation of s. 14(4)(b) of the *Northwest Territories Waters Act*. Specifically, the Board notes that the Carters' written arguments assert the Board failed to "appropriately consider" the Carters' evidence regarding compensation. The Board also expresses concern that the Report of the Pre-hearing Conference used the words "appropriately consider" in characterizing one of the issues before the Court.

[38] In its written submissions on this point, the Board states that s. 14(4)(b) of the *Northwest Territories Waters Act* allows the Board to require payment of compensation that it "considers appropriate" as a condition of a water licence as opposed to requiring it to "appropriately consider" a claim for compensation. The Board goes on to argue that this distinction is important "because s. 14(4)(b) . . . makes it plain that it is for the Board to determine what it considers appropriate; it is not an objective test that would leave open to challenge what is appropriate consideration. That is within the Board's own discretion as the finder of the facts".

¹ The authority to create the *Rules* and their applicability to and effect on the proceedings before the Board in this case are discussed further on in these reasons.

[39] The Carters' concern is that the Board's submissions on this point go to the merits of its own decision.

[40] Although the words used by the Carters in their written arguments are very similar, from the context of their submissions it does not appear that they interpret s. 14(4)(b) in the manner feared by the Board, nor that they ask this Court to do so. The term "appropriately" is used in the Carters' written arguments in the same sense as one would use "properly". In other words, the Carters suggest the Board did not do what was legally required of it to fairly and *properly* determine "appropriate compensation" for adverse effects suffered by the Carters.

[41] The Board's clarification of this point was unnecessary; however, its submissions are limited to comments on its authority and do not amount to an argument on the merits of its decision. Therefore, it cannot be said that it exceed what is contemplated under the *Northwestern Utilities Ltd.* model.

c. The Board's Submissions on Compensation, Burdens of Proof and the Board's Expertise

[42] In its brief, the Board makes submissions on its expertise in assessing and determining appropriate mitigation for adverse effects and how it quantifies compensation for those effects. These are made in the context of the standard of review to be applied respecting its decision on compensation. At paragraph 59 of its submissions, the Board states:

The Board has expertise in determining environmental impacts and jurisdiction to deal with mitigation of those impacts (e.g. maximum water levels). Compensation is a means of mitigation. Quantification of monetary compensation is dependent upon the claimant (the Applicants) meeting the onus of proof that lies upon them. (Emphasis added).

[43] In the first two sentences, this appears to relate to the determination of the standard of review, a matter which all counsel agreed could be addressed by the Board in submissions. The last sentence, however, goes beyond the standard of review and into the merits of the Board's decision on the amount of compensation it ultimately awarded to the Carters. Specifically, it appears the Board is defending the merits of its decision to award compensation to the Carters in an amount significantly less than what they sought because the Board concluded the Carters failed to prove their case.

[44] This goes directly to another key issue in these proceedings, specifically, whether the Board erred in determining the amount of compensation to be paid to

the Carters. This is something far different than an argument about the appropriate standard of review. It is, rather, an argument about whether the Board's decision *meets* that standard of review. Moreover, it is not something requiring clarification. The Board's rationale for denying the bulk of the Carters' claim for compensation is stated plainly in its reasons, which form part of the Record.

[45] The Board's submission on this point exceeds what is proper and it has been given no weight.

d. Submissions Respecting the Board's Position on Claims for Past Adverse Effects

[46] At paragraph 61 of its submissions the Board states:

. . . the Applicants make mention that they sought clarity on the question as to whether or not damages would be awarded retroactively for adverse effects alleged to have occurred prior to the water licence being applied for and that the Board did not provide that clarity. By way of clarification of the Record, the Board wishes to specifically direct the Court to the Board's statement in its December 20, 2011 Information Request letter to the Carter Family:

Please note that the Board will consider your response to determine the appropriate amount of compensation to be paid to the Carter family for the term of the Water Licence. Claims for past adverse effects will not be considered.

[47] The Carters argue this is an "egregious" example of the Board improperly arguing the merits of the decision under review.

[48] The Board's argument goes beyond simply providing an explanation of the record and into the forbidden area of defending the Board's decision respecting its authority. The Record is clear both with respect to the attempt to have the Board state its position on damages for past adverse effects, and the Board's statement on this subject in the Information Request. No supplemental explanation was necessary.

[49] Another reason this is improper is that the Board appears to suggest the Carters knew the Board's position on its ability to award compensation for past adverse effects and thus should not have required further explanation. This, in turn, suggests that the Carters' argument on this point is without merit. That is a matter for the Court, not the Board, to determine.

[50] While I would not characterize it as egregious, the Board's submission nevertheless falls outside the parameters of *Northwestern Utilities Ltd.* and therefore, it has not been a factor that I have considered.

e. Adversarial Tone of the Board's Submissions

[51] Both the Carters and NTPC made errors in their submissions, including errors respecting the application of certain provisions of the *Northwest Territories Waters Act* to proceedings before the Board. These errors bear directly on some of their arguments respecting the standard of review and what degree of procedural fairness should be afforded parties before the Board.

[52] The Carters argue that the overall tone of the Board's brief is adversarial and state that rather than responding to errors in the application and interpretation made by the Carters, the Board ought to have simply set out its own position on interpretation.

[53] While the Board did put forward certain submissions that stray, improperly, into the merits of its decision, it also articulated a number of arguments that are well within what is considered appropriate. Within the boundaries of *Northwestern Utilities Ltd.*, the Board is entitled to make the arguments it deems necessary to effectively represent its position. These will not necessarily line up with the views of either the Carters or NTPC and to this extent, they are adversarial. This does not make them improper.

[54] With respect to the Board's submissions on the interpretation and application of the legislation, it is not disputed that it is for the Court to determine these questions. But, it is for lawyers, as advocates, to ensure that correct information is placed before the Court. Lawyers are human, however, and sometimes honest mistakes are made. Should this happen, it is incumbent upon lawyers to correct that error and ensure that the Court has the proper and correct information before it. While it is preferable that corrections come from the party that made the error, there is nothing wrong with the lawyer for another party, in this case, counsel for the Board, stepping forward to provide the correct information. Again, this does not make the Board's submissions improper.

f. The Overall Impact of Improper Submissions on Impartiality

[55] The Carters suggest that in making improper submissions, the Board has compromised its impartiality to such an extent that should the Court find the Board has erred, the matter should not be remitted to back to it. Rather, they ask this Court to determine the issue of compensation.

[56] There may be times when it is both necessary and justified for a reviewing court to consider the merits and substitute its own decision. Those times will be rare, however, and in my view, would require the Court to find significant improprieties in the manner in which a given tribunal is represented or the submissions it makes, giving rise to tangible concerns about impartiality and the ability of the tribunal to make appropriate arrangements to deal with issues respecting bias, if, in fact, there are any.

[57] That threshold has not been met here. The submissions from the Board which I have determined are improper are relatively small transgressions which are more defensive than adversarial and which do not give rise to a reasonable apprehension of bias. Certainly, they do not amount to “detailed and elaborate arguments in support of its decision”, which was found to be the case in *Northwestern Utilities Ltd.* (at para 51).

3. What is the Appropriate Standard of Review?

[58] There are two standards of review: correctness and reasonableness. In those matters subject to the former, no deference is afforded to the tribunal. Put simply, it has to have been right and if it was not, the Court must substitute its own view for that reached by the tribunal. *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190 (para 60).

[59] In those matters to which the reasonableness standard applies, the Court must exercise deference towards the tribunal. In *Dunsmuir*, the reasonableness standard was articulated as follows:

[47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[60] It is well-established that in the absence of clear legislative intent, determining which of these two standards applies is a two-step process. First, the

Court must examine existing jurisprudence to see if the standard of review has already been determined. If the question remains unanswered, the next step is for the Court to embark on a contextual analysis and apply a number of factors. These are, most commonly: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined in reference to its enabling legislation; (3) the nature of the question at issue; and (4) the tribunal's expertise. *Dunsmuir*, paras 62 and 64; *Khosa v. Canada*, [2009] 1 SCR 339, paras 53 and 54.

[61] The nature of the question can, in many cases, determine the entire issue, making it unnecessary to embark on an exhaustive analysis. As noted in *Dunsmuir* (at para 53), “[w]here the question is one of fact, discretion or policy, deference will usually apply automatically”.

[62] For reasons set out below, the issues of whether the Board erred in not permitting the Carters to respond to NTPC's submissions and whether it erred in not considering damages for past adverse effects must be reviewed on a correctness standard. The issue of whether it erred in determining the amount of compensation must be reviewed on a reasonableness standard.

[63] Whether the Board erred in not permitting the Carters to respond to NTPC's submissions attracts the correctness standard because it is a question of law. Although not all questions of law will be reviewed on a correctness standard, those that are of fundamental importance of the legal system and not within the expertise of the tribunal, do: *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 SCR 77 (paras 60-75); *Dunsmuir*, para. 60.

[64] While its contents may vary depending on the nature of the tribunal, enabling statute, the rights at stake and other factors, procedural fairness is a central component of our justice system and may be characterized readily as a question of law of fundamental importance.

[65] The issue of whether the Board erred in determining that it did not have authority to entertain claims for compensation for past adverse effects under the *Northwest Territories Waters Act* must be reviewed on a correctness standard as well. This is a question of pure jurisdiction and the Board had to be correct. This, too, was confirmed in *Dunsmuir*:

[59] Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. . . . “Jurisdiction” is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a

particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 14-3 to 14-6. . . . These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.

[66] The reasonableness standard applies to the question of whether the Board erred in determining the amount of compensation due to the Carters for adverse effects flowing from the NTPC's proposed activities. This is based on the nature of the question.

[67] Under the *Northwest Territories Waters Act*, once the Board determines that a party will suffer adverse effects as a result of the licence, it must determine what the appropriate compensation will be. There is no dispute that the Board has the authority to do this.

[68] The "appropriate" amount of compensation is a question of fact or, in some cases, mixed fact and law. The answer will be based on the evidence the Board has before it and the conclusions it reaches through its assessment of that evidence. The Carters' concern is with the result of that process.

[69] In its submissions on the standard of review, NTPC raised the issue of the Minister's decision to approve the licence and the standard of review to be applied to that decision. It argued the Minister's decision should be subject to the standard of reasonableness.

[70] It is unnecessary, in the circumstances, to engage in an extensive analysis of the standard of review to be applied to the Minister's decision to approve the licence. The Board hears evidence and imposes appropriate conditions. The Minister's approval is based entirely on the Board's findings and decision. The Minister does not undertake an independent review. If the Board's decision is found to have an incorrect or unreasonable foundation, it follows that the Minister's decision to approve the licence is itself inherently flawed and cannot stand.

4. Were the Carters Denied Procedural Fairness before the Board?

[71] The Carters contend they were denied procedural fairness in three ways.

[72] First, they argue the Board did not assess their compensation claim against the criteria set out in the Information Request, and therefore, the Carters did not know the case to be met, nor could they make a meaningful response.

[73] Second, they contend the Board acted unfairly in failing to clarify its position on how it would use information about loss or damage occurring under past licences to determine compensation under the proposed licence.

[74] Third, they argue the Board erred in refusing to allow them to reply to NTPC's submissions, resulting in an unfair procedure.

[75] NTPC's position is that the procedure the Board followed was fair.

[76] Whether the Board failed to assess the Carters' response in accordance with the criteria set out in the Information Request, or even against criteria that were not disclosed to the Carters, requires an analysis of the Board's reasons for its decision. Accordingly, this issue is addressed later, in the context of the Board's decision on compensation.

[77] The Board did not act unfairly by responding the way it did to the inquiry about how it would use information about loss or damage occurring under past licences to determine compensation under the proposed licence, nor by refusing to provide an interpretation of the legislation.

[78] It is difficult to imagine how the Board would be able to answer the question posed by the Deninu K'ue First Nation on this point in any way other than the answer it gave: that it would consider such arguments as appropriate. The manner in which it would apply evidence and draw conclusions would depend very much on the nature of the evidence, its reliability and relevance, as well as the submissions of the parties about the evidence. None of those things could be properly determined prior to actually receiving the evidence and arguments. Further, providing an answer to these questions outside of the forum and before having an opportunity to consider the evidence and arguments could put the Board in the position of being seen as having pre-judged the case, possibly creating concerns about bias.

[79] With respect to its authority to award compensation for past adverse effects, the Board made its position abundantly clear in the Information Request.

[80] This leaves the question of whether the Board acted unfairly in denying the Carters permission to reply to NTPC's response.

[81] What is required to fulfil the duty of fairness in a proceeding varies with the specific context of the case: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193, 1999 CarswellNat 1124.

[82] In *Baker*, the Supreme Court set out a non-exhaustive list of considerations to be used in determining the contents of the duty of fairness in a given context. These are:

- a. the nature of the decision and the process followed in making it;
- b. the nature of the statutory scheme;
- c. the importance of the decision to those affected;
- d. the legitimate expectations of those challenging the decision; and
- e. the tribunal's choice of procedure.

[83] These factors must be applied and assessed bearing in mind the overall purpose of procedural fairness:

22 Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. Emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker. (Emphasis added).

Baker, supra

a. The Nature of the Decision and the Process Followed in Making It

[84] This factor is described in *Baker* as follows (at para 23):

The more process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision-making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness.

[85] NTPC submits that neither the Board nor the Minister serve an adjudicative function similar to courts. Rather, they perform a broad range of policy-type functions when assessing applications for water licences and adjudicative functions

are but one aspect of this larger array. This argument is not supported by the circumstances, however.

[86] The Record clearly shows that the process followed by the Board to hear and decide the issue of compensation was, in fact, an adjudicative one. The Board asked the Carters to provide information about the amount of compensation to which they felt they were entitled. They were asked to do so within a certain time frame. Following that, NTPC was given an opportunity to review those submissions and to provide a response to them.

[87] This process left the Board with a body of evidence and legal arguments before it which, presumably, it intended to use to determine the appropriate amount of compensation for the Carters. It is a logical expectation that in doing so, the Board would review and assess evidence, and consider the legal arguments, from NTPC, the Carters and others. It would then move on to make a decision within the parameters of the *Northwest Territories Waters Act*. Its decision would affect concretely the interests of the Carters, NTPC and others.

[88] Certainly, the Board and the Minister do serve a number of policy functions under the *Mackenzie Valley Resource Management Act*². In this instance, however, neither the Board nor the Minister was performing a policy role. This was a legal decision resulting from a decidedly adjudicative process, thus calling for more robust procedural protections.

b. The Nature of the Statutory Scheme

[89] There are a number of *indicia* within the legislation that support the argument that the Carters were entitled to procedural protections at the stronger end of the spectrum.

[90] The *Mackenzie Valley Resource Management Act* contains a partial privative clause: *Chicot v. Paramount Resources Ltd. et al*, 2006 NWTSC 30, at para. 26. Although the Board's decisions respecting Type "A" water licences are expressly subject to judicial review and must be approved by the Minister, there is no right of

² In its brief, NTPC pointed to sections 12 and 13 of the *Northwest Territories Water Act* in support of its position on this point. Respectively, these describe the objects of the Northwest Territories Water Board and the Minister's power to impose binding policy directions to that board with respect to the carrying out of any of its functions. These provisions do not apply to the Mackenzie Valley Land and Water Board, however, by reason of s. 105 of the *Mackenzie Valley Resource Management Act*.

appeal. The decisions are deemed final and binding. (*Mackenzie Valley Resource Management Act*, ss. 32, 67 and 81).

[91] The *Act* also contains provisions that contemplate the Board will hear and decide using procedures similar to those used in civil trial courts. In particular, s.25 bestows on the Board the same powers, rights and privileges as this Court has to compel the attendance and examination of witnesses and the production and inspection of documents.³ In addition to promoting the orderly conduct of proceedings before it, this Court's rights, powers and privileges in these areas are aimed at ensuring full disclosure and notice to all parties and, in certain circumstances, to the Court itself. They also help the parties and the Court to avoid surprises, delay and "trial by ambush" in the proceedings, thus promoting efficiency. Overall, they function to ensure the parties have a fair opportunity to present the Court with relevant evidence and submissions.

[92] Section 30(1)(a) of the *Mackenzie Valley Resource Management Act* allows the Board to make its own procedural rules respecting applications, service of documents, time limits and submissions from the public. The Board has in fact created *Rules*, which address a wide variety of procedural issues, including fairness: The following appears in the "Introduction and Purpose" section:

These Rules will ensure that Board proceedings meet the requirements of fairness.
The Rules are also intended to ensure that Board hearings are efficient, focussed [*sic*] and meet the needs of all parties. (Emphasis added)

Mackenzie Valley Land and Water Board Rules of Procedure,
January 14, 2004, p. 3

[93] The concept of procedural fairness is reflected and emphasized in a number of other places in the *Rules*, including the sections that apply specifically to hearings respecting Type "A" waters licences under the *Northwest Territories Waters Act*:

74. Subject to the MVRMA, these Rules, the NWTWA and the requirements of fairness, the Chairperson of the Board or of a Regional Panel of the Board will direct and control the conduct of every hearing. (Emphasis added)

* * *

³ In their brief the Carters argue that the Board has the powers of a commissioner under the *Inquiries Act*, RSC, 1985, c. I-11 by reason of s. 22 of the *Northwest Territories Waters Act*, *supra*; however, s. 105 of the *Mackenzie Valley Resource Management Act*, *supra*, specifically exempts this section from application to the Board.

77. To the extent consistent with its duty of procedural fairness, the Board will emphasize flexibility and informality in its proceedings. (Emphasis added).

Rules, p. 12

[94] Finally, the Board's own objectives suggest greater procedural protections are required in proceedings before it. These are set out in s. 101.1(1) of the *Mackenzie Valley Resource Management Act*:

101.1 (1) The objectives of the Board are to provide for the conservation, development and utilization of land and water resources in a manner that will provide the optimum benefit generally for all Canadians and in particular for residents of the Mackenzie Valley.

[95] To achieve these objectives in the context of a water licence hearing, the Board would surely need to have before it a full explanation of a party's claim for compensation, including the opportunity to respond to submissions and evidence disputing the entitlement and/or amount of any such claim. That is the most obvious means by which the Board can ensure it has the information necessary to make a decision setting out the conditions of development and use of water resources that will "provide optimum benefit for . . . residents of the Mackenzie Valley", including the Carters.

[96] The statutory scheme supports greater procedural protections being in place.

c. The Importance of the Decision to Those Affected

[97] There is no disagreement between the parties that this decision is an important one to the Carters. There are tangible interests at stake. The Carters make their living on Nonacho Lake. It is the basis of their family business. Thus, they have a direct interest in the fair determination of compensation for adverse effects on both their business and their lifestyle, flowing from NTPC's activities.

d. The Legitimate Expectations of the Party Challenging the Decision

[98] If a party has a legitimate expectation that certain procedures will be followed or that a certain result will be reached, greater procedural protections will be required for the tribunal to meet the duty of procedural fairness: *Baker* at para 26.

[99] The Carters had a legitimate expectation that they would have an opportunity reply to NTPC's response to the Information Request, based on the Board's own *Rules*.

[100] The Board chose to issue Information Requests to gather information from the Carters and others about compensation. The Board's *Rules* provide the following with respect to information requests, submissions and written responses to submissions:

Information Requests

46. The Board may issue an Information Request to any party at any stage of any proceeding.
47. The Board may, in its discretion, allow a party to a proceeding to issue an Information Request to another party, subject to directions on timing and procedure issued by the Board. Copies of all Information Requests exchanged among the parties shall be filed with the Board.
48. A party that receives an Information Request during a proceeding shall respond within the time specified by the Board.
49. A party's response to an Information Request shall be submitted to the Board and circulated to the other parties in the proceeding.
50. Any disputes over the appropriateness of an Information Request shall be decided by the Board.

Submissions of Parties

51. Once the Information Request stage of a proceeding is complete or at the time specified by the Board if no Information Requests are authorized, the parties to the proceeding may make written submissions to the Board about the application.
52. A party to a proceeding must provide a copy of its submissions, and any other information specified by the Board, to each of the other parties.
53. If the documents filed by a party exceed fifty (50) pages, the Board may require the filing of up to thirty (30) copies of that material and/or an electronic copy.

Written Response to Parties' Submissions

54. An applicant may, in accordance with the directions of the Board, submit a written reply to any or all of the other parties' submissions.

55. The reply must be provided to the Board and the other parties to the proceeding within the time specified and in the number of copies determined by the Board.

[101] The Board gave the Carters the following reasons for denying their request to respond to NTPC's submission:

The Board has met to discuss your request and has decided that there is no reason to depart from the Board's normal procedure, which is set out in its Rules of Procedure and was explicitly set out for the parties when the Information Request was issued. Accordingly, your request is denied.

That is the process that has been followed in this case and the Board is satisfied that all parties have been given a fair opportunity to be heard. (Emphasis added)

Record, Tab 244

[102] Contrary to what it stated in its reasons for denying the Carters' request to reply, however, the Board did not follow its *Rules* respecting Information Requests.

[103] Had the Board followed its *Rules* respecting Information Requests, the following would have happened: All of the parties would have submitted their responses, which would then have been circulated. Next, all of the parties would have had an opportunity to make submissions on one another's responses. NTPC, as applicant, would have had an opportunity to reply to all of those submissions, but only after everyone else had an opportunity to put their evidence and arguments forward, and to make submissions, including submissions on NTPC's response, pursuant to Rule 51.

[104] Inexplicably, the Board departed from its *Rules* and, in particular, it did not comply with Rule 51 and give the Carters an opportunity to make submissions on NTPC's response to the Information Request.

[105] Rule 54 contemplates that an "applicant" in a water licence proceeding, such as NTPC, can make a reply to other parties submissions, effectively having the "last word". The reason for this seems plain enough: since the applicant will be the party responsible for complying with the conditions of the licence and paying compensation to adversely affected parties.

[106] From a procedural fairness perspective, however, Rule 54 makes sense only if the Board first complies with Rule 51, and allows the other parties to make

written submissions to the Board on other parties' responses *after* the Information Request stage of a proceeding is complete.

e. The Board's Choice of Procedure

[107] It was stated in *Baker* (at para 27) that the court's analysis of what is required for procedural fairness must consider and respect the Board's choice of procedure. In this case, the procedure chosen by the Board did not comply with its own *Rules* and it was inherently unfair. The result was that the Carters were denied a meaningful opportunity to present their case.

[108] Considering the factors in *Baker*, the logical conclusion is that the contents of procedural fairness in this case included a requirement that Carters be allowed to make submissions on NTPC's response to the Information Request. They were denied this and they were thus denied procedural fairness. The Board erred in denying the Carters this opportunity.

5. Does the Board have authority to award compensation for past adverse effects?

[109] The Board's authority to award compensation for adverse effects is set out at ss. 14(4) and (5) of the *Northwest Territories Waters Act*.

[110] The Carters submit the Board has the authority to award compensation for adverse effects occurring under previous licences. They argue the Board erred in failing to exercise this authority.

[111] NTPC's position is that Board is not empowered to determine and award compensation for past adverse effects. The Board shares this view.

[112] The Supreme Court of Canada addressed the question of the sources of an administrative tribunal's jurisdiction in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, [2006] 1 SCR 140 and described the analytical framework this way:

38 But more specifically in the area of administrative law, tribunals and boards obtain their jurisdiction over matters from two sources: (1) express grants of jurisdiction under various statutes (explicit powers); and (2) the common law, by application of the doctrine of jurisdiction by necessary implication (implicit powers) (see also D. M. Brown, *Energy Regulation in Ontario* (loose-leaf ed.), at p. 2-15).

[113] The starting point is to determine the ordinary meaning of the words in ss. 14(4) and (5) and ask if the Board is granted express authority to award compensation for past adverse effects. If that does not result in a definitive answer about the extent of the Board's authority to award compensation, the next step is to examine the entire legislative context and determine if the authority is granted by necessary implication.

[114] The relevant portions of sections 14(4) and (5) of the *Northwest Territories Waters Act* are as follows:

14. (4) Where an application for a licence is made, the Board shall not issue a licence unless the applicant satisfies the Board that

* * *

- (b) compensation that the Board considers appropriate has been or will be paid by the applicant . . . to . . .
- (i) any licensee who holds a licence issued under this Act or the *Nunavut Waters and Nunavut Surface Rights Tribunal Act* and to whom paragraph (a) does not apply,
 - (ii) domestic users,
 - (iii) instream users,
 - (iv) authorized users,
 - (v) authorized waste depositors,
 - (v.1) persons referred to in paragraph 61(d) of the *Nunavut Waters and Nunavut Surface Rights Tribunal Act*,
 - (vi) owners of property,
 - (vii) occupiers of property, and
 - (viii) holders of outfitting concessions, registered trapline holders, and holders of other rights of a similar nature

who were such licensees, users, depositors, owners, occupiers or holders, whether in or outside the water management area to which the application relates, at the time when the applicant filed an application with the Board in accordance with the regulations made under paragraphs 33(1)(d) and (e), who would be adversely affected by the use of waters or deposit of waste proposed by the applicant, and who have notified the Board in response to the notice of the application given pursuant to subsection 23(1) and within the time period stipulated in that notice for making representations to the Board;

* * *

(5) In determining the compensation that is appropriate for the purpose of paragraph (4)(b), the Board shall consider all relevant factors, including, without limiting the generality of the foregoing,

- (a) provable loss or damage;
- (b) potential loss or damage;
- (c) the extent and duration of the adverse effect, including the incremental adverse effect;
- (d) the extent of the use of waters by persons who would be adversely affected; and
- (e) nuisance, inconvenience and noise.

[115] The Carters submit that once it is demonstrated that a party comes within the category of persons set out in s. 14(4) and “. . . would be adversely affected by the use of the waters or deposit of waste proposed by the applicant . . .” that party is entitled to compensation. They also point to an absence of words limiting compensation to that for future adverse effects.

[116] The Carters argue further that in their plain and ordinary meaning, the terms “provable loss or damage” and “potential loss or damage” in s. 14(5) (a) and (b), respectively, give the Board clear authority to award compensation for past adverse effects. Specifically, they submit that “provable loss or damage” is synonymous with loss or damage that has already occurred. Had Parliament intended to limit compensation to future occurrences, there would be no need to include “potential loss or damage” as a separate factor for consideration.

[117] The problem with these arguments is they are inconsistent with the express words in s. 14(4) and (5). As a condition of granting a licence, the Board must be satisfied that appropriate compensation has been or will be paid to a party who “would be” adversely affected by what is “proposed”. Both “would be” and “proposed” are expressions of something that will happen in the future. In this context, “provable” and “potential” losses could just as easily be interpreted to mean losses or damages that will *definitely* occur and those which *might* occur, respectively.

[118] In my view, subsections 14(4) and (5) of the *Northwest Territories Waters Act* do not explicitly grant authority to the Board to award compensation for adverse effects that have occurred under past licences. On the contrary, the wording supports the conclusion that the Board may award compensation only for losses or damages that will or might occur as a result of the use proposed by the licensee. At best, the provisions are equivocal. Thus, it is necessary to go to the

next step and examine the broader legislative scheme to determine if the Board has this authority through the doctrine of jurisdiction by necessary implication.

[119] In *ATCO*, Bastarache, J., citing the Ontario Energy Board's decision in *Re Consumers' Gas Co.*, E.B.R.O. 410-II/411-II/412-II, March 23, 1987, set out the circumstances where the doctrine can be applied. Among these are: where the jurisdiction is necessary to accomplish the objectives of the legislative scheme and is essential to the Board fulfilling its mandate; and where the enabling act fails to explicitly grant the power to accomplish the legislative objective (at para 73).

[120] Neither of these circumstances are present here.

[121] The legislative framework is prospective in nature, aimed at mitigating loss or damage that may occur in the future as a result of a proposed use while still permitting development.

[122] As noted, the Board's objectives are "to provide for the conservation development and utilization of land and water resources in a manner that will provide the optimum benefit generally for all Canadians and in particular for residents of the Mackenzie Valley." (*Mackenzie Valley Resource Management Act*, s. 101.1).

[123] In considering an application for a licence under the *Northwest Territories Waters Act*, the Board has a number of remedial tools at its disposal to meet its objectives and balance the competing interests embodied in each of conservation, development and utilization of land and water. One of these is to award compensation for adverse effects that will flow from the proposed use. Another is to impose conditions to actually mitigate adverse effects of the proposed use under s. 15. In this case, for example, the Board imposed a requirement that the water level of Nonacho Lake remain within a certain range and a requirement that NTPC monitor this and other expected effects on the water over the course of the licence.

[124] The Board applies remedial tools in the context of an application for licence that *may* be granted, not one that has been granted already. Put another way, compensation for and mitigation of adverse effects are addressed at the outset, as a condition of the licence. The licensee must comply with the conditions of the licence while engaging in the activity for which the licence is granted. The conditions are not imposed *after* the licence has been granted or after it has expired. As noted above, the Board may order compensation to be paid to parties who "would be" affected by the "proposed" use, but not those who have been affected by past use.

[125] That the Board's authority to award compensation is prospective only is further supported by the fact that an award of compensation by the Board does not foreclose on a party's ability to sue a licensee for loss or damages incurred as a result of the issuance of a licence. The right to sue for compensation is specifically preserved by s. 30 of the *Northwest Territories Waters Act*, even where compensation has been paid at the direction of the Board under s. 14(4).

[126] Following an application, a licence may be granted for up to 25 years.

[127] Another factor to consider is that each application for a licence is a separate proceeding. Thus, where an applicant is granted two licences consecutively, the latter is not a continuation of the former. They are separate licences: *North American Tungsten Corp. v. Mackenzie Valley Land and Water Board*, 2002 NWTSC 76 at paras 35-40; 2002 CarswellNWT 89⁴.

[128] Based on the foregoing, I conclude that the framework created by the *Mackenzie Valley Resource Management Act* and the *Northwest Territories Waters Act* does not include the authority, either express or by necessary implication, for the Board to award compensation for loss and damage incurred under previous licences. The overall tenor of the legislation is "forward looking". The Board's powers are there so it may balance conservation and development by, among other things, addressing adverse effects expected to occur in the future as a result of the licenced use. Authority to award compensation for past adverse effects is not necessary to enable the Board to achieve its objectives or carry out its mandate, nor is it required to achieve the broader objectives of the licencing framework.

6. Did the Board Err in its Decision on Compensation for Future Adverse Effects?

[129] I find the Board erred in its decision on compensation.

[130] This is based on two things. First, I have found that the Board breached its duty of fairness in denying the Carters the opportunity to make submissions on NTPC's response to the Information Request. A decision emerging from a process lacking in fairness cannot be said to be reasonable.

[131] Second, the Board's reasons for its decision respecting compensation for the Carters lack the justification, transparency and intelligibility required to meet the standard of reasonableness.

⁴ This decision was ultimately overturned, but on other grounds: *North American Tungsten Corp. v. Mackenzie Valley Land and Water Board*, 2003 NWTCA 5; [2003] 10 WWR 257; 2003 CarswellNWT 22

[132] The Board's reasons on this point were as follows:

In its decision, the Board considered:

- The “provable loss or damage” in the future for the Carter Family;
- The “potential loss or damage” which is damage that is reasonably foreseeable to occur in the future;
- The extent and duration of the future adverse effect(s) on the Carter Family, including any “incremental adverse effect”;
- The extent to which the Carter Family uses the waters in Nonacho Lake;
- Whether there should be compensation for “nuisance, inconvenience and noise” under 14(5)(e); and
- All other “relevant factors” to determine if the Carter Family should receive compensation.

The Board made it very clear that past losses are not compensable under the NWTWA. Subsection 14(4)(b) of the Act can only be used to compensate for future damages and cannot be applied retroactively.

* * *

The Board notes that the Carter Family bears the onus to prove that compensation is owed to them and in what amount. The Board has found that insufficient proof was provided in the Carter Family's Claim to establish and quantify any provable and potential losses or damages that the Taltson facility may have in the future on the Carter Family.

The Board has determined that the Carter Family will suffer nuisance and inconvenience as a result of the Taltson Facility. Nuisance and inconvenience is an ongoing consequence of any project. The bulk of the impact on the Carter Family occurred in the first year of operations of the dam. Those past, initial impacts cannot be compensated now. It is difficult to quantify the value of ongoing nuisance and inconvenience going forward. It would seem mainly linked to the fluctuations in water levels and the impact of dead trees on the access to fishing and upon navigation.

* * *

There was inadequate proof provided for the costs associated with the specific items of damages the Carters claimed under the “Nuisance and Inconvenience” category. The Carters provided a Compensation Claim for “Nuisance and Inconvenience” in the amount of \$250,000, but provided no details on how this value was determined. Although there was inadequate proof of specific costs associated with Nuisance and Inconvenience, the Carters will continue to co-exist on Nonacho Lake with the Taltson Facility. From time to time, the Facility could cause fluctuations of water levels that could impact the Carter Family and which

would not otherwise occur without the existence of the Taltson Facility. Such impacts are not easily quantified.

In the absence of detailed cost estimates, the Board has decided to award the Carter Family a portion of their “Nuisance and Inconvenience” claim in the amount of sixty-two thousand five hundred dollars (\$62,500.00), to be paid as a lump-sum by NTPC within 60 days of the issuance of this WL.

Record, Tab 1 at 15-16

[133] The Board set out *pro forma* the legal framework in s. 14 of the *Northwest Territories Waters Act* for determining the appropriate compensation for adversely affected parties; but nowhere in the reasons is the evidence related to this. Similarly, the Board provided no analysis relating the Carters’ response to the questions it posed respecting losses in the Information Request and, in turn, relating this to why the response fell short of the proof required. The Board simply reiterated that the Carters had the onus of proving that compensation was owed to them and in what amount, and stated that it found the Carters provided insufficient proof of their claim for compensation.

[134] The Board also rejected the bulk of the Carters’ claim for damages for nuisance and inconvenience, finding there was no basis for the amount of nuisance and inconvenience damages the Carters sought.

[135] The Record clearly indicates that both the Carters and NTPC made extensive submissions and provided expert reports respecting compensation for economic losses and out-of-pocket expenses. The Carters’ response also included a considerable amount of information about the nuisance and inconvenience they felt they had and would continue to suffer as a result of NTPC’s hydroelectric operations. They provided extensive submissions on the methodology used to quantify these heads of damage.

[136] Despite this, the Board conducted no analysis of the Carters’ claim for business and economic losses and, at best, it undertook a superficial analysis of the claim for nuisance and inconvenience. It conducted no analysis of the methodology used to arrive at the proposed amount of compensation. The Board also failed to provide any explanation for how it determined that \$62,500.00 was appropriate compensation for nuisance and inconvenience. There is simply no apparent basis for the Board’s conclusions.

[137] While it is for the Board to consider and weigh the evidence and draw factual conclusions, it had to tell the parties why it reached the conclusions it did.

The Carters were entitled to know what standard they had to meet and why they fell short of it. In doing so, the Board was required to provide enough detail and analysis to allow the Carters to understand the rationale. The Board did not do this.

[138] The result is there is no basis upon which the Court can conclude that the Board's decision comes within a range of possible and defensible outcomes in the circumstances. Rather, the Board's decision is unjustified and unintelligible, and accordingly, unreasonable.

III. CONCLUSION

[139] Following are the conclusions on each issue:

1. The proper applicants are Jean Carter, Myles Carter, Dean Carter and Kandee Froese. Their spouses and children and the Nonacho Lake Fishing Camp did not participate in proceedings before the Board and are not properly named as applicants in this proceeding.
2. The Board made a number of submissions to this Court that go beyond issues of jurisdiction, clarification of the record or the standard of review. These were improper; however, their inappropriateness is not of such a degree that the impartiality of the Board has been compromised.
3. The standard of review on the issues of procedural fairness and the Board's authority to award compensation for adverse effects occurring under previous water licences is correctness. The standard of review with respect to the Board's decision on the amount of compensation is reasonableness.
4. In being refused an opportunity to make submissions on NTPC's response to the Information Request, the Carters were denied procedural fairness.
5. The *Northwest Territories Waters Act* does not grant the Board authority to award compensation for adverse effects arising under past water licences and the Board was correct in its decision on this.
6. The Board's decision on the amount of compensation to be paid to the Carters does not meet the standard of reasonableness.

IV. REMEDY

[140] An order quashing the Board's decision entirely would be inappropriately broad. The matter of compensation, though no doubt of great significance to the Carters, is just one of many aspects of the licence. It is also something that can be addressed in a manner discrete from the other aspects, none of which are in issue.

[141] The following relief is granted:

1. An order in the nature of *certiorari* quashing those portions of the Board's decision and the Minister's approval dealing with compensation for the Carters;
2. An order in the nature of *mandamus* requiring the Board to provide the Carters with an opportunity to make submissions to the Board on NTPC's response to the Information Request in accordance with the Board's *Rules*;
3. An order remitting the matter of compensation to the Board for consideration and a decision, including consideration of the submissions from the Carters respecting NTPC's response to the Information Request; and
4. An order amending the style of cause to reflect that the applicants are Jean Carter, Myles Carter, Dean Carter and Kandee Froese.

[142] The Carters seek costs on a solicitor and client basis, but neither the Carters nor NTPC have made substantive submissions on the issue of costs. The parties may file and serve on each other written submissions on costs within 60 days of the date of these Reasons. Should no submissions be received, the Carters will have party-party costs in accordance with Column 5 of Schedule A to the *Rules of the Supreme Court of the Northwest Territories*.

K. Shaner
JSC

Dated in Yellowknife, NT this
7th day of March, 2014

Counsel for the Applicant: E. Olszewski

Counsel for the Respondent
Northwest Territories Power Corp: J. Rossall

Counsel for the Respondent
Mackenzie Valley Land and Water Board: J. Hope-Ross

**IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES**

BETWEEN

JEAN CARTER, MYLES CARTER, DEAN
CARTER, AND KANDEE FROESE, ON THEIR
OWN BEHALF AND ON BEHALF OF THEIR
SPOUSES AND CHILDREN, AND THE NONACHO
LAKE FISHING CAMP

Applicants

-and-

NORTHWEST TERRITORIES POWER
CORPORATION AND THE MACKENZIE VALLEY
LAND AND WATER BOARD

Respondents

REASONS FOR JUDGMENT OF
THE HONOURABLE JUSTICE K. SHANER
