

June 16, 2017

Via email: sallerston@mvlwb.com

Mackenzie Valley Land and Water Board
7th Floor, 4922 - 48 Street
P.O. Box 2130
Yellowknife, NT X1A 2P6
Attention: Shannon Allerston, Regulatory Officer
Board Members

Dear Sirs and Mesdames:

Re: NPTC v. Carters – Taltson Compensation Re-Hearing
File No.: 028628-0004

We are writing further to the compensation re-hearing held before the Mackenzie Valley Land and Water Board (the "**Board**") on May 16-17, 2017 (the "**Compensation Re-Hearing**"). These are the Carter Family's further closing submissions.

Background

Further to the Board's correspondence of March 17, 2017, the Carter Family and the Northwest Territories Power Corporation ("**NTPC**") filed supplemental written submissions on April 18, 2017. NTPC appended new evidence to its written submissions including the *Competitive Analysis of the Outfitted Recreational Sport Fishing Sector of the Northwest Territories* (March 2014) ("**Fishing Sector Report**") and the Taltson Twin Gorges Generating Station and Facilities AEMP, Mercury in Sediment and Fish Flesh Monitoring (October 2, 2014) ("**2014 AEMP**").

At the Compensation Re-hearing, the Board granted the Carter Family's request to admit the Report on Samples of Lake Trout, Lake Whitefish, and Northern Pike Taken from Nonacho Lake, NWT, Summer 2014, and Analyzed for Mercury by R.A. Bodaly (May 2017) ("**Bodaly May 2017 Report**").

The Board also granted the Carter Family and NTPC the opportunity to ask questions related to the Fishing Sector Report, the 2014 AEMP and the Bodaly May 2017 Report (collectively, the "**Reports**"), in the form of Undertaking 1 and Undertaking 2.

The Board further granted the Carter Family and NTPC the opportunity to provide further written closing submissions regarding the Reports and the responses to the Undertakings.

On May 26, 2017, pursuant to Undertaking 1, NTPC asked the Carter Family to respond to five questions regarding the Bodaly May 2017 Report. The Carter Family provided responses to the questions on June 9, 2017.

These are the Carter Family's further closing submissions.

Fishing Sector Report

The Carter Family submits that the Board ought to reject the Fishing Sector Report.

Pursuant to section 14 of the *Northwest Territories Waters Act*,¹ the Carter Family is entitled to compensation as a user of the water who will be adversely affected by NTPC's use of the waters under the Licence. The Board has already found that the Carter Family will be adversely affected by NTPC's operations under the Licence and that the Carter Family is entitled to compensation.² In the Board's previous reasons for decision, it awarded the Carter Family compensation for the adverse effects that they will experience due to NTPC's operations under the Licence. Justice Shaner did not disturb this finding on judicial review. As a result, the sole issue for the Board is the quantum of compensation to be awarded to the Carter Family. In accordance with Justice Shaner's decision, the Board is to decide the amount of compensation to be awarded to the Carter Family after deciding the appropriate methodology to be applied and thoroughly analyzing the evidence presented.

The Carter Family submits that the Board should apply a compensatory approach to quantifying the damages that the Carter Family will suffer due to the adverse effects resulting from NTPC's operations under the Licence. Section 14 of the *NWT Waters Act* is plainly intended to compensate users of the waters who will be adversely affected by a licensee's use of the waters. In fact, the legislature viewed the matter of compensation as so fundamentally important that the Board cannot issue a licence until the applicant has satisfied the Board that appropriate compensation has been or will be paid.³

The Carter Family submits that the Board should award compensation on the basis of the Nonacho Lake Lodge's ("**Lodge**") loss of patrons due to NTPC's operations.

In contrast, NTPC argues that the Carter Family ought to be awarded no compensation; or, in the alternative, if any compensation is to be awarded, then NTPC says it should be quantified based on the current fair market value of the Lodge. To support this valuation methodology, NTPC relies on the Fishing Sector Report and other third-party materials to argue that factors outside of NTPC's operations have caused the decline in the Lodge's patrons.

¹ SC 1992, c 39, repealed by *Northwest Territories Devolution Act*, SC 2014, c 2, s 66 [*NWT Waters Act*].

² Mackenzie Valley Land and Water Board Panel Meeting of November 24, 2011 at para 11.

³ *NWT Waters Act*, *supra* note 1, s 14(4)(b).

NTPC's proposed method of valuation has no support in the legislation. There is no basis in section 14 of the *NWT Waters Act* for the Board to apply an expropriation approach or to order NTPC to pay the amount that it would cost to "buy out" the Lodge. Section 14 of the *NWT Waters Act* compensates a user who will be adversely affected by the licensee's use of the waters. It necessarily implies that the user will continue to use the waters. In these circumstances, the Carter Family will continue to use the waters and will continue to be adversely affected by NTPC's use of the waters. The Carter Family is entitled to be compensated for these adverse effects.

NTPC's valuation approach attempts to artificially narrow the scope of section 14 of the *NWT Waters Act* to the point where no compensation can be awarded. In these circumstances, NTPC argues that 2011 provides the economic and environmental "baseline" for which any adverse effects must be measured against. The nature of the adverse effects caused by NTPC's operations and the Taltson Facility cannot be evaluated by a simple comparison of data from one year to the next. The adverse effects in these circumstances relate to a living ecosystem.

Under NTPC's approach, no compensation would be awarded in circumstances such as these where the nature and extent of the adverse effects is not discovered until a later time. In particular, the mercury health advisory was not issued until 2011. Under NTPC's approach, the Carter Family is not entitled to compensation for the ongoing adverse effects that they will experience during the term of the Licence, because there were also high mercury levels in the year prior to issuance of the Licence. If this approach is applied, then the only time that the Carter Family could have been compensated for the adverse effects related to high levels of mercury in the fish is when they had no knowledge of the high mercury levels in Nonacho Lake. This approach is contrary to the legislative intent in creating a scheme in which those "who would be adversely affected by the use of waters" must be compensated for those adverse effects by the licensee.

NTPC argued this narrow approach is necessary because to find otherwise would open the floodgates to claims for compensation. No floodgates concerns arise in this claim for compensation. The Carter Family's claim for compensation is not based on environmental effects in and of themselves; it is based on the economic losses to the Carter Family's business resulting from the adverse effects due to NTPC's operations. This is a loss that is unique to the Carter Family as the sole occupants of Nonacho Lake and the operators of a fishing lodge on Nonacho Lake.

NTPC describes its valuation approach as "reflective of the industry conditions and actual industry transactions."⁴ However, a reliance on industry conditions fails to adequately consider the actual conditions at Nonacho Lake and the Lodge.

In particular, NTPC relies on the Fishing Sector Report as demonstrating that the negative sport fishing industry trends identified in the Odyssey Report are continuing.⁵ The Odyssey Report relied on the industry trends to conclude that there was a weak correlation between NTPC's operations and

⁴ Submissions of NTPC (April 18, 2017) at 36.

⁵ *Ibid* at 27-28.

the Lodge's loss of patrons and that other factors had a much more meaningful impact on the loss of patrons.

The Fishing Sector Report was developed to assist NWT Tourism in developing a competitive marketing strategy and branding of the fishing sector.⁶ Specifically, it was intended to assist in developing destination-specific marketing strategies for the sports fishing industry in the NWT.⁷ It provides no useful guidance to the Board in determining the amount of compensation that ought to be awarded to the Carter Family for the adverse effects resulting from NTPC's operations under the Licence.

Furthermore, the Fishing Sector Report's analysis is based on factual circumstances that are markedly different from those at Nonacho Lake. The Fishing Sector Report explicitly stated that the "quantity of fish caught, relative size of fish, variety of species and general ease of fishing in the NWT were never raised as issues through the research."⁸ The Report further noted that the quality of the fish in the NWT are "excellent".⁹ At the Compensation Re-Hearing, the Carter Family presented evidence that the fish in Nonacho Lake are not healthy and that the variety of species is declining.

Elder Boucher testified regarding the changes in the quality and quantity of fish at Nonacho Lake.¹⁰

In discussing the 2011 mercury advisory for Nonacho Lake, Dean Carter explained the challenges the Carter Family experiences in marketing the Lodge given the quality of the fish in Nonacho Lake and the variety of fish species:

As you can imagine, this has become a challenge for us to continue to operate a fishing lodge where lake trout are not safe to consume, because of high mercury levels. And think of it this way, we are a fishing business and there's a sign on the lake that says, Mercury in the fish. Dod -- don't eat the fish unless they're small.

Our patrons say, We won't be going to Nonacho Lake anymore because of mercury issues, or because we can't eat the fish...

Please read what our guests have to say about Nonacho Lake, why they stopped coming. And you'll find it wasn't only because of lake trout. Some said, We used to catch arctic grayling there. Others said, you -- you know, The pike are not as abundant as they were.¹¹

⁶ Fishing Sector Report at 5.

⁷ *Ibid* at 6-7.

⁸ *Ibid* at 8.

⁹ *Ibid* at 4.

¹⁰ Board, Taltson Compensation Re-Hearing, Transcript (May 17, 2017) at 18-25.

¹¹ *Ibid* at 30-31, 35.

The Fishing Sector Report is based on the assumption that the fishing is good in the NWT and that fishing lodges can adjust their marketing strategies to promote the quality of the fish and the variety of species to attract new patrons. This is not the reality for the Carter Family and the Lodge: there is a mercury advisory in place for Nonacho Lake and the fish cannot be freely consumed. NTPC's reliance on industry trends in quantifying the compensation to be awarded to the Carter Family ignores the reality of the circumstances at Nonacho Lake and the Lodge.

The Board ought to reject the Fishing Sector Report and the conclusions that NTPC draws from it.

Bodaly May 2017 Report

The Bodaly May 2017 Report provides further support for Dr. Bodaly's conclusion that mercury levels in Nonacho Lake are an ongoing impact of the hydroelectric development at Nonacho Lake.¹²

In 2014, the Carter Family commissioned a study of mercury levels in fish at Nonacho Lake. The data from this study is provided in the Bodaly May 2017 Report. Of the Lake Trout sampled, 88% of the samples had mercury levels above the Frequent Consumer of Fish Guidelines, and 86% of the Northern Pike samples had mercury levels above the Guidelines.¹³ High mercury levels in fish impact the Lodge's operations as a fishing lodge. As discussed above, it is difficult for the Carter Family to market the Lodge when they have to advise patrons that the fish are not safe to consume.

In response to Undertaking 1, the Carter Family provided data that was gathered with respect to McArthur Lake during the 2014 study. The Carter Family submits that the Board ought to consider the mercury levels in fish in Nonacho Lake independent of any data collected from other lakes, including the control lakes discussed in the 2014 AEMP.

Mercury concentrations in northern lakes vary greatly between lakes.¹⁴ Furthermore, Nonacho Lake is a reservoir lake and cannot be compared to non-reservoir lakes. The data for mercury levels in fish for Nonacho Lake follows the expected trend with respect to mercury levels in fish following hydroelectric development. As a result, there is no need for the Board to conduct an analysis of mercury levels in fish in other lakes.

The Carter Family submits that the Board's analysis should be focused on the adverse effects to the Carter Family due to the high mercury levels in Nonacho Lake resulting from NTPC's operations.

¹² R.A. Bodaly, PhD, Rebuttal to Cambria Gordon Report (February 2017) at 11[Bodaly February 2017 Report].

¹³ Response to Undertaking 1 (June 9, 2017) at 5.

¹⁴ Bodaly February 2017 Report at 2.

Conclusion

In summary, the Carter Family submits that the Board ought to reject the Fishing Sector Report. It ignores the reality of the Lodge's actual operating conditions and provides no useful guidance for quantifying the damages suffered by the Carter Family due to the adverse effects resulting from NTPC's operations under the Licence. It supports a valuation approach that ignores the fundamental importance that the legislature placed on the need to compensate those adversely affected by a licensee's operations.

The Carter Family further submits that the Board's analysis of the adverse effects due to the mercury levels in fish resulting from NTPC's operations ought to focus on the data with respect to the mercury levels in fish in Nonacho Lake. The data from the 2014 mercury study further demonstrates that mercury levels in fish continue to exceed the Guidelines and are a continuing impact of NTPC's operations.

The Carter Family makes these submissions further to their closing submissions provided at the Compensation Re-Hearing on May 17, 2017.

We trust that you will find the foregoing to be in order. The Carter Family thanks the Board for its consideration of these further closing submissions.

Yours truly,

MLT AIKINS LLP

FOR:

Per:



Eleanor A. Olszewski, Q.C.

EAO:fl

cc: Doug Evanchuk & Sean Parker, Counsel for NTPC
Sheldon Toner & Caroline Wawzonek, Counsel for MVLWB

From: [Shannon Allerston](#)
To: [Permits](#)
Subject: FW: Claim for Compensation Undertakings
Date: Friday, June 16, 2017 2:56:45 PM
Attachments: [image001.png](#)
[Ltr to Mackenzie Valley Land and Water Board - June 16, 2017.pdf](#)

MV2011L4-0002 – Carter Family Final Written Statements

From: Jessica Buhler [<mailto:JBuhler@mltaikins.com>]
Sent: June-16-17 2:46 PM
To: Shannon Allerston; Eleanor Olszewski; Doug Evanchuk
Cc: Caroline Wawzonek; sheldon@dragontoner.ca; MMiller@ntpc.com; jpickett@ntpc.com; Sean Parker; deanrmcarter@gmail.com; myles@nonacho.com; Kandee6627@yahoo.com; Jean; Dlcarter1980@gmail.com; Rebecca Chouinard; Shelagh Montgomery
Subject: RE: Claim for Compensation Undertakings

Good afternoon Shannon,

Please see attached the Carter Family's further closing submissions.

Best regards,

Jessica Buhler

Lawyer

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From: Shannon Allerston [<mailto:sallerston@mvllwb.com>]
Sent: Tuesday, May 30, 2017 2:35 PM
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Cc: Caroline Wawzonek; sheldon@dragontoner.ca; MMiller@ntpc.com; jpickett@ntpc.com; Sean Parker; deanrmcarter@gmail.com; myles@nonacho.com; Kandee6627@yahoo.com; Jean; Dlcarter1980@gmail.com; Rebecca Chouinard; Shelagh Montgomery; Jessica Buhler
Subject: Claim for Compensation Undertakings

Good afternoon,

As you are aware, questions stemming from the Undertakings recorded during the Re-Hearing were due on Friday, May 26. Questions were provided by the Northwest Territories Power Corporation (NTPC) in response to the late submission of evidence by the Carter Family ("Report on Samples of Lake Trout, Lake Whitefish, and Northern Pike Taken from Nonacho

Lake, NWT, Summer 2014, and Analyzed for Mercury” by R.A. Bodaly). No questions on the Aquatic Effects Monitoring Program Report or the 2014 Sport Fishing Analysis (both attached to the Northwest Territories Power Corporation's written submission filed on April 18, 2017) were submitted by the Carter Family. The questions stemming from this undertaking are attached above for your reference and available on the Board’s public registry. The Carter Family now has until June 9, 2017, to respond to Northwest Territories Power Corporation's questions.

Following the responses to the undertaking, each party has the opportunity to conclude its closing remarks in response to the information provided. The Carter Family’s closing remarks in response to the undertakings are due on June 16, 2017 and NTPC’s closing remarks in response to the undertakings are due on June 23, 2017.

Please let me know if you have any questions.
Thank you,

Shannon Allerston, MA, MSc
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