

AT THE MACKENZIE VALLEY LAND AND WATER BOARD

**IN THE MATTER OF THE TALTSON COMPENSATION CLAIM RE-HEARING**

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**MOTION FOR COSTS**

**Submitted by: The Carter Family**

**January 26, 2018**

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## **I. INTRODUCTION**

1. Jean Carter, her two sons, Myles Carter and Dean Carter, and her daughter, Kandee Froese (the "**Carter Family**") bring this motion for costs pursuant to Rules 21 to 26 of the *Mackenzie Valley Land and Water Board Rules of Procedure*<sup>1</sup> and the Mackenzie Valley Land and Water Board's (the "**Board**") correspondence of September 15, 2017.

## **II. STATEMENT OF FACTS**

2. The Carter Family owns Nonacho Lake Lodge, a fly-in fishing lodge located on the shores of Nonacho Lake. Five generations of Carters have called Nonacho Lake a second home.
3. In the summer of 2011, the Carter Family received notice that the Northwest Territories Power Corporation ("**NTPC**") had applied for a water licence on Nonacho Lake. For the past seven years, the Carter Family has worked tirelessly to ensure that its family and business interests are protected under NTPC's Licence.
4. The Carter Family's Claim for Compensation was first addressed in the Board's Reasons for Decision, dated November 24, 2011. On March 15, 2012, following the Minister of Aboriginal Affairs and Northern Development's ("**Minister**") direction that the Board quantify the compensation payable to the Carter Family, the Carter Family submitted a Response to Information Request for Claim for Compensation outlining the basis of their request for compensation.<sup>2</sup>
5. On April 23, 2012, NTPC filed a Response,<sup>3</sup> which contained expert evidence that had not been provided to the Carter Family before that, namely, the Cambria Gordon report ("**Cambria Gordon Report**"). The Board rejected the Carter Family's request for an

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<sup>1</sup> January 14, 2004.

<sup>2</sup> NTPC – Carter Response to Information Request for Claim of Compensation – Mar15-12, The Carter Family, Response to Information Request for Claim of Compensation (15 March 2012).

<sup>3</sup> NTPC Response forwarded to Carter Family – Apr23-12, Response of Northwest Territories Power Corporation (23 April 2012).

opportunity to respond to NTPC's Response, which meant that the Carter Family was unable to provide any submissions regarding the effects of the dam on aquatic life.

6. On May 24, 2012, the Board determined that Water Licence MV2011L4-0002 (the "**Licence**") ought to be issued to NTPC, subject to a number of terms and conditions.<sup>4</sup> The Board ordered NTPC to pay the Carter Family \$62,500.00 pursuant to paragraph 14(4)(b) of the *Northwest Territories Waters Act*.<sup>5</sup>
7. The Minister approved the Licence on July 26, 2012. The term of the License is from August 31, 2012 to August 30, 2027.
8. Due to the unfairness in the Carter Family's inability to respond to NTPC's Response, the Carter Family sought judicial review of the Board's decision and the Minister's approval. On March 7, 2014, Justice Shaner of the Supreme Court of the Northwest Territories agreed with the Carter Family and granted their application for judicial review of the Board's decision and the Minister's approval with respect to the compensation awarded to the Carter Family.<sup>6</sup> The Board's decision and the Minister's approval with respect to the compensation awarded to the Carter Family were set aside.
9. The Board was directed to provide the Carter Family with an opportunity to respond to NTPC's Response, including the Cambria Gordon Report, and to reconsider the matter of the compensation to be awarded to the Carter Family.<sup>7</sup> Justice Shaner made this decision on the basis that there had been a breach of natural justice and procedural fairness in the initial hearing.
10. On May 16 and 17, 2017, the Board held a re-hearing to determine the Carter Family's Claim for Compensation. On August 10, 2017, the Board found that the Carter Family has experienced and will continue to experience adverse impacts on their lifestyle and use of

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<sup>4</sup> NTPC-WL Issuance – Terms and Conditions –May24-12, Decision from Mackenzie Valley Land and Water Board, Panel Meeting of May 24, 2012, MV2011L4-0002, online: Registry <<http://www.mvlwb.ca/Registry.aspx>> [Reasons for Decision].

<sup>5</sup> SC 1992, c 39, repealed by *Northwest Territories Devolution Act*, SC 2014, c 2, s 66.

<sup>6</sup> *Carter v Northwest Territories Power Corp*, 2014 NWTSC 19.

<sup>7</sup> *Ibid*, para 141.

waters from NTPC's continued operations on Nonacho Lake. The Board found that the Carter Family's Claim for Compensation with respect to the adverse effects on their individual and family lifestyle had merit.<sup>8</sup> On November 8, 2017, the Minister approved the Board's recommendation.

### **III. DECISION REQUESTED**

11. The Carter Family requests the Board order NTPC to pay the Carter Family's reasonable and necessary costs in pursuing its Claim for Compensation. Please see attached Schedule A for these costs.

### **IV. REASONS FOR REQUEST**

12. The Carter Family has experienced and will continue to experience adverse impacts on their lifestyle and use of waters from the continued presence of NTPC's operations on Nonacho Lake. The Board has consistently found that the Carter Family will be adversely affected by NTPC's Licence and has consistently awarded the Carter Family compensation.<sup>9</sup> In its August 10, 2017 Reasons for Decision, the Board found that the Carter Family's Claim for Compensation with respect to the adverse effects on their individual and family lifestyle had merit.<sup>10</sup> In pursuing this meritorious Claim for Compensation, the Carter Family has reasonably and necessarily incurred costs, including expert and legal costs.

13. All of the Carter Family's costs have been incurred as a direct result of NTPC's application for a Licence renewal in 2011.

14. When the Carter Family received notice of NTPC's application, it chose to seek compensation for the adverse effects it would experience through the Board process outlined in the *Northwest Territories Waters Act*. The Carter Family understood that the Board

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<sup>8</sup> Reasons for Decision (August 10, 2017), para 121.

<sup>9</sup> NTPC – Board Recommendation to Minister – Nov29-11, Decision from Mackenzie Valley Land and Water Board Panel Meeting of November 24, 2011 at 11; NTPC – Issuance letter with conditions and RFD for Minister approval – May24-12, Decision from Mackenzie Valley Land and Water Board Panel Meeting of May 24, 2012 at 13-16; NTPC – Board Recommendation for Approval – Update to Type A Water Licence and RFD – Compensation – Aug10-17, Decision from Mackenzie Valley Land and Water Board Meeting of July 11 and 13, 2017 at para 121.

<sup>10</sup> Reasons for Decision (August 10, 2017), para 121.

process was supposed to be accessible to members of the public, timely and cost-effective. Unfortunately, this was not the case. Instead, the Carter Family was quickly thrown into an adversarial process, which required legal representation and expert evidence and, as a result, significant costs were incurred.

15. In pursuing its Claim for Compensation, the Carter Family was initially self-represented. They only retained MLT Aikins LLP<sup>11</sup> when they realized they could not properly participate without legal counsel. Legal assistance was required to assist the Carter Family in navigating the process and to deal with the lack of clarity in the governing legislation. MLT Aikins LLP represented the Carter Family in the proceedings leading to the Board's three decisions on the Carter Family's Claim for Compensation, in addition to the proceedings before the Supreme Court of the Northwest Territories.

16. With respect to the lack of clarity in the legislation, the legislation is particularly unclear with respect to whether past or future losses are compensable. In the Board's correspondence of December 20, 2011, the Board asked:

What costs or damages have you suffered to date? (Give details and indicate how you have come to any estimates of damages).

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).

17. Based on this correspondence, the Carter Family reasonably proceeded on the understanding that both past and future losses were compensable. The Board later concluded that only future losses were compensable; however, the Carter Family had already incurred costs with respect to proving its past losses.

18. In addition, NTPC's filing of previously undisclosed expert evidence (specifically, the Cambria Gordon Report), the Carter Family's inability to respond because of NTPC's

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<sup>11</sup> Previously MacPherson Leslie Tyerman LLP.

position, and the subsequent decision of the Board, all left the Carter Family with no choice but to pursue judicial review of the Board's decision.

19. The only remedy available to the Carter Family was judicial review and a re-hearing before the Board. The effect of the judicial review and the re-hearing was to render the Carter Family's previous participation in the Board process completely meaningless. The Carter Family was returned back to square one with respect to proving its Claim for Compensation, having already spent tens of thousands of dollars in pursuing it.
20. In addition to legal counsel, the Carter Family was assisted by Kingston Ross Pasnak LLP in quantifying the Claim for Compensation. On March 15, 2012, Mr. Randy Popik provided expert evidence to support the Carter Family's Response to Information Request for Claim for Compensation. On February 16, 2017, Mr. Popik provided revised expert evidence for the Board's re-hearing. Mr. Popik also attended the Board's re-hearing on May 16, 2017 to assist the Board in understanding his expert evidence.
21. The Carter Family was also assisted by Dr. Drew Bodaly in qualifying the Claim for Compensation. His report was prepared in response to the Cambria Gordon Report. On February 16, 2017, Dr. Bodaly provided expert evidence for the Board's re-hearing. Dr. Bodaly also attended the Board's re-hearing on May 16 and 17, 2017 to assist the Board in understanding his expert evidence.
22. Again, the Carter Family chose to participate in this process based on the understanding that it would be accessible to members of the public and would be timely and cost-effective - it has been anything but. As a result of NTPC's application for a Licence renewal, the lack of clarity in the legislation and the adversarial nature of the proceedings before the Board, the Carter Family had to incur substantial costs to participate in these protracted proceedings. Through no fault of the Carter Family, a second hearing was required, which meant that significant additional time and expense had to be spent.
23. The Carter Family's Claim for Compensation is meritorious. There is no doubt that they have been affected by NTPC's operations and will continue to be. The legislation provides a

process by which the Carter Family should be compensated for these effects, but the process was ultimately flawed and led to much additional expense.

24. The Carter Family respectfully submits that they should be compensated for the costs incurred to advance this meritorious Claim for Compensation.

**V. CONCLUSION**

25. For these reasons, the Carter Family respectfully requests the Board order NTPC to pay the Carter Family's reasonable and necessary costs in pursuing its Claim for Compensation.

26. The Carter Family thanks for the Board for its consideration of this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of January, 2018.

**MLT AIKINS LLP**

Per. 

Eleanor A. Olszewski QC  
Counsel for the Carter Family

**Schedule A**

MLT Aikins LLP	\$227,044.92
Kingston Ross Pasnak LLP	\$42,114.12
	\$269,159.04