

Board File MV 2011 L4-0002

**Application for Renewal of Water Licence N1L5-0514
Storage and Diversion of Water for a Hydro Electric
Power Undertaking and Associated Uses at the
Taltson Hydro Electric Power Generation Facility,
Northwest Territories**

Northwest Territories Power Corporation

SUBMISSIONS OF NORTHWEST TERRITORIES POWER CORPORATION

April 18, 2017

Submitted to:

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I. INTRODUCTION AND BACKGROUND

The following submissions are provided by the Northwest Territories Power Corporation (“NTPC”) to the Mackenzie Valley Land and Water Board (“Board”) in response to the claims for compensation made by the Carter Family (or the “Carters”). These matters arise under the Northwest Territories Waters Act (the “Act”) related to the application by NTPC for the issuance of a Type A Water Licence (the “Licence”) in renewal of licence NIL5-0514. These submissions shall be referred to as the “NTPC 2017 Submissions”.

On March 15, 2012, the Carter Family submitted their Response to Information Requests for Claim of Compensation (the “Carter 2012 Response”) as directed by the Board on December 20, 2011. The Carter 2012 Response relies on an Economic Loss Report prepared by Kingston Ross Pasnak LLP (the “2012 Economic Loss Report”), being Schedule 1 to the Carter 2012 Response.

NTPC provided its response submissions (the “NTPC 2012 Response”) to the Carter 2012 Response on April 23, 2012. The NTPC 2012 Response included two expert reports and associated attachments:

1. Cambria Gordon Report, Review of Carter Family Claim of Adverse Aquatic Effects to Nonacho Lake, April 2012 (the “Cambria Gordon Report”); and
2. Odyssey Chartered Account & Advisor Report, April 23, 2012 (the “Odyssey Report”).

The Carter Family applied to the Board for an opportunity to reply to the NTPC 2012 Response, including the Cambria Gordon Report and Odyssey Report, but were denied. The Board rendered its reasons for decision on the Licence, including the compensation to be paid to the Carters, on May 24, 2012, and transmitted its decision to the Minister by letter of the same date. The Minister approved the licence and advised the Board of this by letter dated July 26, 2012.

The Carter Family then applied for judicial review of the Board's decision to the Supreme Court of the Northwest Territories.

On March 7, 2014, Justice Shaner of the Supreme Court of the Northwest Territories issued her decision following the judicial review hearing where she ordered, among other things, that the Carter's compensation claim be remitted to the Board, and that the Carters shall be given an opportunity to make submissions on the NTPC 2012 Response in accordance with the Board's Rules of Procedure ("Rules").

Justice Shaner's decision is clear that the Act does not grant the Board authority to award compensation for adverse effects arising under past water licences, and that the re-hearing proceedings currently before the Board shall be in accordance with the Board's Rules.

On February 17, 2017, the Carter Family submitted the following two expert reports in reply to the NTPC 2012 Response:

1. R.A. Bodaly, Rebuttal to Cambria Gordon Report, February 2017 ("Bodaly 2017 Report"); and
2. Kingston Ross Pasnak LLP, Response to Odyssey Report, February 17, 2017 ("KRP 2017 Report").

NTPC provides these NTPC 2017 Submissions in response to the Bodaly 2017 Report and KRP 2017 Report, and in accordance with the Board's direction of March 17, 2017.

II. SUMMARY

As set out in the NTPC 2012 Response, NTPC submits that the remaining claims for compensation set out in the Carter 2012 Response should be denied for the following principal reasons:

1. the Board should give no weight to the claims made by the Carter Family, as these claims are based on the personal observations and assertions of

- the Carter Family in an attempt to gain substantial and personal financial rewards;
2. there is no independent scientific evidence to support the claims and assertions in the Carter 2012 Response that the operations of and the use of waters by the Taltson Hydro Electric Power Generation Facility (“Taltson Facility”), including at NTPC’s rock pile dam and control structure located at Nonacho Lake, have and will result in adverse environmental effects resulting in compensable losses under the Act;
 3. independent expert evidence obtained by NTPC demonstrates that there is no relevant or substantial impact or linkage between the claims in the Carter 2012 Response of adverse environmental effects upon the Nonacho Lake Lodge business and the continued operations of the Taltson Facility during the term of the Licence;
 4. independent expert evidence obtained by NTPC demonstrates that the 2012 Economic Loss Report is based on assumptions, which were not independently derived and which are highly questionable to substantiate the economic losses claimed; and
 5. the calculation of other losses and damages in the Carter 2012 Response is fundamentally flawed and contrary to law.

In addition to these submissions, which remain equally valid today, we note that the Carter 2012 Response seeks compensation for past losses. A claim of compensation for past losses is contrary to law. Justice Shaner expressly ruled that adverse effects arising under past water licences were not compensable in these proceedings. As such, NTPC submits that any claims for past losses or losses related to operations under past licences are irrelevant and ought not be considered by the Board.

Further, and in addition to the submissions below, the Carters’ compensation claim cannot be sustained for the following reasons:

1. the Licence contains several conditions that mitigate potential adverse environmental effects including at Nonacho Lake;¹
2. the Carter Family has not submitted any evidence to substantiate the assertions that the Taltson Facility has created unnatural erosions, which has resulted in adverse environmental impacts, and the recent data from operations under this Licence actually shows the opposite;
3. contrary to the Carters' allegations, recent data from operations under this Licence shows that mercury levels are decreasing;
4. the Carter Family has failed to produce any scientific evidence showing a causal link between the operation of the Taltson Facility and the extinction of fish in Nonacho Lake;
5. there is no evidence supporting the Carters' claim that reduced stocks of fish species has caused economic losses;
6. there is no evidence of a connection between operations under this Licence and parasitic cysts or other condition factors of fish in Nonacho Lake;
7. contrary to the Carters' allegations, the data indicates that the species assemblage is similar to surrounding the surrounding lakes, the catch-per-unit-effort for Lake Trout was highest in Nonacho Lake and lake trout population in Nonacho Lake may actually be increasing;
8. the Carters' expert reports on economic losses are based on inappropriate and incorrect assumptions, do not consider several crucial factors and use questionable methodologies;

¹ Licence at clauses B.1, B.2, B.7, B.10, C.1-C.4, C.6-C.8, D.2 and F.1-F.11,

9. the Carters have failed to provide any reasons for the precipitous drop off in patrons in the mid-1990s and instead have ignored this fact without explanation;
10. the Carters' submissions do not account for external factors such as decreases to the overall sport fishing industry in the north when calculating the losses claimed;
11. the Carters have failed to account for reclamation costs as a liability of the Nonacho Lake Lodge arising from its use of the leased land, and payable at the termination of the lease regardless of the operation of the Taltson Facilities;
12. the lease with the territorial government expires on March 31, 2022 and there is no evidence indicating that the Nonacho Lake Lodge will operate beyond that date;
13. any losses relating to cabins and other structures damaged from rising water levels should be denied, as such losses, if any, have been self-inflicted by the Carter Family from actions that are contrary to the terms of the lease, including, for example, placing facilities within 31 meters of the ordinary high water mark; and
14. the Carters are claiming compensation for nuisances and inconveniences that are normal parts of running a fishing camp in a remote location, such as maintenance to docks, finding new fishing "hot spots" and looking for lost guests.

None of the foregoing conclusions are altered, or affected in any way, by the response filed by the Carters on February 17, 2017. More particularly, the evidence contained in the Bodaly 2017 Report and the KRP 2017 Report has failed to substantiate the losses and compensation claimed by the Carter Family. Indeed, the evidence in these reports reflects an inappropriate attempt by the Carter experts to not only advocate for their

clients' position, but also to opine on areas outside the area of their subject matter expertise. These actions undermine the credibility of their evidence, and should result in the Board giving this evidence no weight.

In addition, the Carters' claim for \$250,000 for loss of lifestyle and legacy lacks merit and support from any authority. The claim relies on authority for an award for loss of lifestyle and legacy claimed by an entire First Nations community, and which included consideration for past losses under a different legislative regime. However, the Carters fail to explain how that authority could apply to this matter, given completely different circumstances.²

Although it is unfortunate that the expectations held by the Carter Family to run the Nonacho Lake Lodge for many more years may not be fulfilled, this outcome did not result from operation of the Taltson Facility, and in particular from the use of waters under this Licence, and therefore, NTPC ought not be required to pay for those unfulfilled expectations.

Moreover, the Carter Family has operated the Nonacho Lake Lodge on the subject lands as a lessee for many years, and has renewed their lease on several occasions after the Taltson Facility was built. The Carter Family decided to establish themselves at Nonacho Lake being fully aware of the existence of the Taltson Facility.

Given Justice Shaner's ruling that adverse effects arising under past water licences are not compensable, the environmental conditions and the Carters' economic circumstances as of 2011 are the applicable "baseline" for these proceedings, as those were the conditions and circumstances immediately preceding NTPC's operations under this Licence. Accordingly, the fact that NTPC has been operating under the Licence since the beginning of 2012 provides the Board with information as to the actual impacts, or lack of impacts, to the Carters under this Licence.

² Carter 2012 Response at pages 14 and 15; and NTPC 2012 Response at pages 29 and 30.

III. REPLY TO BODALY 2017 REPORT

Critical flaws of the Bodaly 2017 Report can be summarized as follows:

1. Dr. Bodaly has a fundamental misunderstanding of NTPC's operations at the Taltson Facility;
2. the Bodaly 2017 Report fails to consider relevant information going directly to the issues in this matter;
3. the Bodaly 2017 Report includes contradictory findings and information;
4. the Bodaly 2017 Report erroneously attempts to reverse the applicable legal onus from the Carters onto NTPC;
5. the Bodaly 2017 Report provides new evidence beyond what is permitted pursuant to Justice Shaner's Order and the common law on issues not previously raised by the Carters or NTPC; and
6. Dr. Bodaly provides opinions on areas outside of his expertise and acts as an advocate for the Carter Family.

These critical flaws are each addressed below.

In addition, it is worth noting that the Bodaly 2017 Report provides no responses to the following evidence from the Cambria Gordon Report debunking allegations made by the Carter Family:

1. through results of the ongoing Aquatic Effects Monitoring Program ("AEMP") and Sediment and Erosion Monitoring Program ("SEMP"), independent bodies including the Department of Fisheries and Oceans ("DFO") have not identified any significant impacts associated with the continued operation of the Taltson Facility;³

³ Section 3.1 of Cambria Gordon Report at pages 5-7.

2. the alleged extinction of fish species, such as arctic grayling, can only be associated with past operations and not NTPC's use of waters under the current Licence;⁴
3. the data shows that the condition of lake trout in Nonacho Lake is similar to other lakes in the immediate area;⁵
4. the data shows that Nonacho Lake has the lowest percentage of lake trout infected with parasitic cysts as compared to the surrounding lake systems, including two control lakes (Gagnon Lake and Rutledge Lake);⁶
5. the fish species assemblage is similar to comparable lakes in the area and the catch per unit effort ("CPUE") for lake trout was higher in Nonacho Lake;⁷ and
6. NTPC has developed and implemented a robust AEMP and SEMP through the Board's licencing process, with input from various stakeholders, under which it monitors parasites, cysts, condition factor, mercury concentrations, species assemblage, and littoral habitats, and sediment and erosion processes within Nonacho Lake.⁸

This evidence submitted in the NTPC 2012 Response is supported by scientifically collected data, and has not been contradicted or addressed in a material way by any of the Carters' submissions, including the Bodaly 2017 Report. Simply put, the Carters have failed to contradict the scientific evidence presented by NTPC.

(i) Fundamental Misunderstanding of NTPC's Operations

⁴ Section 5.1 of Cambria Gordon Report at page 21.

⁵ Section 5.2 of Cambria Gordon Report at pages 21 and 22.

⁶ Section 5.3 of Cambria Gordon Report at pages 22 and 23.

⁷ Section 5.4 of Cambria Gordon Report at pages 23 and 24.

⁸ As examples, see 3.1.1, 3.1.2, 3.4.1, 3.4.2, 5.2.1 and 5.4.1 of Cambria Gordon Report at pages 5-7, 15, 16, and 21-23.

It is clear from reading the Bodaly 2017 Report that Dr. Bodaly has a fundamental misunderstanding of NTPC's operations of the Taltson Facility. The Bodaly 2017 Report repeatedly refers to "drawdowns" and controlling water levels of Nonacho Lake as if NTPC is actively storing water and manipulating the dam at the lake for operation of the generation equipment, located approximately 200 km downstream.⁹ That is a significant mischaracterization of what NTPC's operations actually are.

The fact is that the Taltson Facility is operated essentially as a run-of-the-river facility, meaning that NTPC takes minimal actions to manage the flow in the system and any fluctuations in the water levels result from natural flow patterns.

Contrary to what one might glean from the Bodaly 2017 Report, the control structure at Nonacho Lake is a low-tech facility essential consisting of a rock pile with logs (or "gates") inserted that allow for some adjustment of flow rates.¹⁰ Even with the modest ability to adjust flows at Nonacho Lake, NTPC operates the Taltson Facility essentially as a run-of-the-river facility and has made very limited adjustments in the past several years, and any adjustments made have often been to reduce the impacts of extreme natural fluctuations.¹¹

This fundamental misunderstanding of NTPC's operation, and specifically "drawdowns" at Nonacho Lake, permeates the Bodaly 2017 Report and erodes the conclusions and opinions expressed in it. In other words, Dr. Bodaly has not provided reasoned opinions as to the impacts of NTPC's operations because he does not understand what those operations actually are.

Given Dr. Bodaly's clear and fundamental misunderstanding of NTPC's operations at Nonacho Lake, NTPC submits that the Board give no weight to the opinions and conclusions expressed in the Bodaly 2017 Report.

⁹ See for example Bodaly 2017 Report at pages 1 and 7-11.

¹⁰ See photos of the Nonacho Lake control structure at **TAB A**.

¹¹ See Nonacho Spillway Operations Log at **TAB B**.

(ii) Failure to Consider Relevant Information

The Bodaly 2017 Report fails to consider relevant information that has been collected from operations under this Licence since it was granted in 2012. In particular, the Bodaly 2017 Report fails to consider the findings presented in the AEMP Monitoring Report for 2014 (“2014 AEMP Report”),¹² and the AEMP and SEMP Monitoring Report for 2015 (“2015 AEMP and SEMP Report”).¹³ The 2014 AEMP Report and 2015 AEMP and SEMP Report include information about mercury levels and erosion under this Licence, but this information was ignored in the Bodaly 2017 Report.

This is a glaring omission highlighted by the fact that the 2014 AEMP Report and 2015 AEMP and SEMP Report were provided to the Carters’ counsel on January 13 and 17, 2017 in response to their request for updated data. The requested data was provided, but not considered in the Bodaly 2017 Report.

(1) Mercury

Despite being provided with recent mercury data, the Bodaly 2017 Report makes the following assertion:

“... recent trends are not consistent with the temporary effects of flooding on mercury in fish. It appears there may have been recent increases in mercury in lake trout in Nonacho Lake.”¹⁴

This assertion is based on data ending in 2010, but fails to consider, or deliberately ignores, data from 2013 showing a decrease in mercury levels, even though that data was requested and provided.

The 2014 AEMP Report shows that total mercury concentrations (mg/kg wet weight) have generally been declining in lake trout from Nonacho Lake over the period of record

¹² Taltson Twin Gorges Generating Station and Facilities AEMP, October 2, 2014 at **TAB C**; See also memo by Ecofish Research Ltd. titled “MV2011L4-0002 - NTPC - Taltson SEMP and AEMP Annual Report for 2013 - Mar20-14.pdf” on the Board’s registry for this matter.

¹³ Titled “MV2011L4-0002 - NTPC - Taltson - AEMP and SEMP Monitoring for 2015 - Mar31-16” on the Board’s registry for this matter.

¹⁴ Bodaly 2017 Report at page 3.

(1975, 1986, 2003, 2004, 2010, and 2013).¹⁵ Total Mercury was measured at 0.334 ug/g in 2013, down from 0.56 ug/g in 2010, but this decline was ignored in the Bodaly 2017 Report.

(2) Erosion

With respect to shoreline erosion, the Bodaly 2017 Report states the following:

... visual observation of shores on Nonacho lake provides direct evidence of erosion that continues to the present. The CG Report refers to monitoring programs that are ongoing, and states that after completion of system monitoring, there will be an understanding of the effects of water management on shoreline erosion.¹⁶

...

... simple observations of shorelines on Nonacho Lake support the conclusion that flooding and operation of the Taltson system as a hydroelectric generating system have had and continue to have significant impacts on the characteristics of the shores in Nonacho Lake.¹⁷

Despite Dr. Bodaly's apparent visual observations of current shoreline conditions to support his conclusions, the Bodaly 2017 Report completely ignores the data and independent expert opinions presented in the 2015 AEMP and SEMP Report, which states the following:

The landscape is dominated by rocky shorelines composed of bedrock or boulders where erosion is no longer occurring at rates higher than the natural rates. Furthermore, erosion is only occurring at the erosion-prone sites during storm cycles associated with large wave and/or currents, and as such, the erosion is not persistent. Based on these two factors, within Nonacho Lake, erosion is considered to be not significant.¹⁸

The independent experts at the consulting firm Northwest Hydraulic Consultants were retained specifically to assess the erosion at Nonacho Lake as part of the SEMP. Northwest Hydraulic Consultants concluded that the shoreline erosion "are within the

¹⁵ 2014 AEMP Report at page 40.

¹⁶ Bodaly 2017 Report at page 4.

¹⁷ Bodaly 2017 Report at page 5.

¹⁸ Northwest Hydraulic Consultants Report at section 3.1 (page 29), dated March 22, 2016, being part of the 2015 AEMP and SEMP Report.

natural variability of pre-project rates”.¹⁹ In other words, the experts in the field of shoreline erosion have concluded that the erosion observed at Nonacho Lake is within the natural range and does not appear to have been caused or increased by NTPC’s operations under this Licence. Despite having this information available, Dr. Bodaly ignored it and instead relied only on visual observations and photos taken by someone else.

The Bodaly 2017 Report fails to provide any explanation of how NTPC’s operations under this Licence are contributing to shoreline erosion in any way. The Bodaly 2017 Report clearly falls short with respect to the allegation that NTPC’s operations under this Licence are contributing to shoreline erosion at all.

In addition, it does not appear as though Dr. Bodaly is qualified to give an expert opinion on geomorphology and shoreline erosion as he has attempted to do. This issue is discussed further below.

Although Dr. Bodaly states at page 2 of the Bodaly 2017 Report that he “... was instructed to review only the materials and data that were available at the time of the preparation of the ...” 2012 Cambria Gordon Report, this instruction was clearly not followed. Dr. Bodaly expressly based his report on a site visit in 2015²⁰ and includes a number of photographs from 2013 and 2016 with respect to his comments in shoreline erosion.²¹

Dr. Bodaly’s failure to consider relevant known information from the operations under this Licence make his conclusions unsupportable, especially since the ignored information refutes the opinions expressed in his report. NTPC submits that the Board should recognize this significant shortcoming of the Bodaly 2017 Report and accordingly, give it no weight.

¹⁹ Northwest Hydraulic Consultants Report at sections 1.5 and 3.1 (pages 9 and 29), dated March 22, 2016, being part of the 2015 AEMP and SEMP Report.

²⁰ Bodaly 2017 Report at page 1.

²¹ Bodaly 2017 Report at pages 5-7.

Further, NTPC submits that the choice to ignore relevant recent information that does not support the Carters' position, while including other recent more convenient information contrary to his instructions, calls into question the motivations behind the Bodaly 2017 Report and the role of Dr. Bodaly as an advocate rather than an expert witness. This issue is discussed further below.

(iii) Contradictory Findings and Information

The Bodaly 2017 Report contains contradictory findings and information. For example, the Bodaly 2017 Report states the following at page 2:

... Given the range of mercury concentration in northern Canadian lakes, I think that it is a more fruitful avenue of discussion to consider Nonacho Lake as separate from other northern lakes.²²

However, Bodaly 2017 Report goes on to state the following at page 3:

...it would appear that mercury in lake trout may now be higher than the average for northern lakes...

And the following at page 4:

... mercury in fish in Nonacho lake [is] relatively high compared to the average for northern lakes...

While NTPC disputes any allegation that its operations under this Licence will have mercury impacts and submits that the data shows that mercury levels are actually declining, the point here is that the Bodaly 2017 Report first says that Nonacho lake should be considered separately from other northern lakes, but then selectively compares it to other lakes when it is convenient for the Carters' position.

In addition, NTPC disputes the allegations in the Bodaly 2017 Report that the Cambria Gordon Report "has attempted to create the false impression that mercury in fish is high throughout the north, whereas it is actually highly variable."²³ This is a collateral attack on the Cambria Gordon Report when averaged data relating to mercury is used for

²² Bodaly 2017 Report at page 2.

²³ Bodaly 2017 Report at page 4.

certain analysis. The weakness of this allegation is highlighted by the fact that the Bodaly 2017 Report itself compares mercury levels in Nonacho Lake to the average to other northern lakes in other parts of the report.²⁴

Another glaring contradiction is the statement at page 2 of the Bodaly 2017 Report that Dr. Bodaly "... was instructed to review only the materials and data that were available at the time of the preparation of the ..." 2012 Cambria Gordon Report. Dr. Bodaly expressly bases his report on a site visit in 2015²⁵ and includes a number of photographs from 2013 and 2016.²⁶ Thus, the Bodaly 2017 Report was based on information clearly in contradiction with Dr. Bodaly's instructions.

These contradictions eliminate logic from the opinions presented, and call into question Dr. Bodaly's role as an advocate rather than an expert witness.

(iv) Erroneous Suggestions to Reverse the Legal Onus Away from the Carters

The Carters have the onus to prove their claim for compensation. This requires the Carters to prove that NTPC's operations under this Licence are causing the environmental impacts that they have alleged, and if impacts are proven, the amount of compensation that should be paid for those impacts. The Board held the following at pages 11 and 12 of its November 24, 2011 Reasons for Decision for the Licence:

... the onus is upon the party claiming compensation to prove that it is entitled to compensation and to prove what the amount of compensation should be.

This finding has not been challenged and remains. However, despite this clear pronouncement, the Bodaly 2017 Report suggests in a number of places that the Board should take caution when relying on the Cambria Gordon Report on the basis that there is a lack of data to show that NTPC's operation under this Licence are not causing the

²⁴ Bodaly 2017 Report at pages 3 and 4.

²⁵ Bodaly 2017 Report at page 1.

²⁶ Bodaly 2017 Report at pages 5-7.

alleged adverse effects. This approach is wrong at law and does not help the Carters' case.

The onus is on the Carters to prove their claim; the onus is not on NTPC to disprove the alleged environmental impacts claimed by the Carters.

The following are examples of where the Bodaly 2017 Report erroneously attempts to shift the onus from the Carters to NTPC:

1. The speculation that the lake trout population at Nonacho Lake could be increasingly comprised of older fish with more mercury due to greater release of older fish resulting from possible mercury concerns of the sport fishing public.²⁷ This is pure speculation with no supporting data of any kind. The Bodaly 2017 Report fails to make any connection between catch and release practices and mercury levels at Nonacho Lake. In any event, as discussed above, recent monitoring data shows that mercury levels are actually decreasing at Nonacho Lake and, as discussed below, speculation about sport fisher's perceptions is far beyond what Dr. Bodaly may be qualified to comment on.
2. The assertion that the Cambria Gordon Report "should have" noted the lack of data regarding shoreline erosion when reaching the conclusions presented. The Bodaly 2017 Report states the following at page 11:

... because there is no quantitative data on shore erosion, either from before or after development, there is no evidence of a lack of an effect either.²⁸

Again, this is the wrong legal test and does not assist the Carters in advancing their claim. It is up to the Carters to prove their allegation that NTPC's operations under this Licence have caused increased erosion beyond natural levels.

²⁷ Bodaly 2017 Report at page 4.

²⁸ Bodaly 2017 Report at page 1.

However, they have failed to do so, and the 2015 AEMP and SEMP Report, which was ignored in the Bodaly 2017 Report, demonstrates just the opposite.²⁹

3. The Bodaly 2017 Report suggests caution with respect to the potential impacts of “drawdowns” on spawning.³⁰ This part of the Bodaly 2017 Report is rife with speculation and lacks supporting data. These “cautions” consistently suggest “possible” connections and that NTPC’s operations “could” have an impact on the environment. However, like the other examples, these “cautions” do not meet the applicable legal test and do not help the Carters advance their compensation claim. These “cautions” do not offer any alternate conclusions, and fail to demonstrate a connection between NTPC’s operations under this Licence and the alleged environmental impacts. In addition, and as discussed above, these “cautions” are based on the misunderstanding of NTPC’s operations and “drawdowns”, further weakening this part of the Bodaly 2017 Report.

The Bodaly 2017 Report does not present conclusions based on scientific data that show NTPC’s operations under this Licence have caused the alleged environmental impacts. Rather, the Bodaly 2017 Report offers speculation and suggestions that NTPC cannot prove that it has not caused the alleged impacts, but that falls short of the applicable legal test. As a result, the Carter Family, even with the Bodaly 2017 Report, have failed to meet their legal onus to prove that NTPC’s operations under this Licence have caused the alleged environmental impacts, and that compensation is owed to them.

(v) Improper Introduction of New Evidence

The Bodaly 2017 Report attempts to introduce new evidence beyond what is permitted pursuant to Justice Shaner’s Order on issues not previously raised by the Carters or NTPC. Paragraph 2 of Justice Shaner’s June 18, 2014 Order states the following:

²⁹ Northwest Hydraulic Consultants Report at sections 1.5 and 3.1 (pages 9 and 29), dated March 22, 2016, being part of the 2015 AEMP and SEMP Report.

³⁰ Bodaly 2017 Report at pages 8 and 9.

The Board shall provide the Carters with an opportunity to make submissions in reply to the NTPC's April 23, 2012 response to the Information Request regarding compensation in accordance with the Board's rules.

[emphasis added]

The law is clear that in rebuttal a claimant (i.e. the Carter Family) can only respond to matters raised in the opposing party's (i.e. NTPC) submissions, and cannot split its case and raise new matters after the opposing party's submissions have been made.³¹ This rule is reflected in Justice Shaner's June 18, 2014 Order.

Information tendered by the Carters in the Bodaly 2017 Report violates this basic rule of rebuttal evidence and Justice Shaner's June 18, 2014 Order by attempting to introduce new information with respect to alleged potential impacts on lake whitefish spawning and population demographics resulting from "drawdowns".³² The Carter Family did not raise issues with respect to lake whitefish spawning and population demographics in the Carter 2012 Response and as such, there was no such allegation for NTPC to respond to in the NTPC 2012 Response. NTPC objects to the improper introduction of this new information by the Carters and submits that the Board ought to find that any references to lake whitefish spawning and population demographics in the Bodaly 2017 Report are inadmissible.

Further, alternatively, and in addition to the submissions above, references to lake whitefish spawning and population demographics in the Bodaly 2017 Report are rife with speculation and lack supporting data. These references suggest possible connections that "could" have an impact on the environment, which do not meet the applicable legal test and do not help the Carters advance their compensation claim. This is another example of Dr. Bodaly's misunderstanding of NTPC's operations and "drawdowns".

(vi) Providing Opinions Where Not Qualified and Acting as an Advocate

³¹ *Krause v The Queen*, 1986 CanLII 39 (SCC), [1986] 2 SCR 466 at pp. 473-474 at **TAB D**.

³² Bodaly 2017 Report at pages 9-11.

Dr. Bodaly may have experience with respect to studying mercury in fish, however, he is not an expert with respect to:

1. shoreline erosion;
2. human psychology and public perception; or
3. questions of law.

Despite Dr. Bodaly's lack of expertise in these areas, the Bodaly 2017 Report attempts to provide opinion evidence of this nature.

(1) Shoreline Erosion

Upon examination of Dr. Bodaly's CV, it is apparent that his area of study relates to fish biology and ecology. Those fields of study are distinct from how hydroelectric facilities may impact shoreline erosion, which are part of the scientific discipline known as geomorphology. How hydroelectric facilities may impact shoreline erosion deals with physical processes from, for example, wind and water. This is completely distinct from biological or ecological processes associated with studying fish populations.

The specialized field of geomorphology is recognized by NTPC, which is why the independent experts at the consulting firm Northwest Hydraulic Consultants were retained to assess the erosion at Nonacho Lake as part of the 2015 AEMP and SEMP Report, where it was concluded that the shoreline erosion "are within the natural variability of pre-project rates",³³ and does not appear to have been caused or increased by NTPC's operations under this Licence.

Despite not being an expert in this area and having the findings of Northwest Hydraulic Consultants available to him, Dr. Bodaly offers his opinions and attempts to implicate NTPC's operations as causing unnatural erosion at Nonacho Lake.³⁴

³³ Northwest Hydraulic Consultants Report at sections 1.5 and 3.1 (pages 9 and 29), dated March 22, 2016, being part of the 2015 AEMP and SEMP Report.

³⁴ Bodaly 2017 Report at pages 4-7 and 11.

NTPC objects to all of Dr. Bodaly's evidence with respect to erosion and submits that the Board ought to give no weight to any such evidence in the Bodaly 2017 Report.

(2) Human Psychology and Perceptions

While Dr. Bodaly may have experience with respect to studying mercury in fish, the Bodaly 2017 Report inappropriately attempts to characterize the presence of mercury in the Nonacho Lake system as an ongoing impact under this Licence due to alleged publicity of mercury in the Nonacho Lake system and perceptions of patrons of the Nonacho Lodge. For example, the Bodaly 2017 Report states the following:

Whether mercury in fish in Nonacho Lake is declining, stable or rising, I consider that the issue of mercury in Nonacho Lake as not only a past, but also a persistent and future impact of the Twin Gorges hydroelectric development. It was clear to me, based on a visit to the Nonacho Lake fish camp in 2015, that guest fishermen were acutely aware of mercury as a potential human health problem. One group would not keep or eat any lake trout greater than 5 pounds in weight because of concern regarding high mercury in larger fish. Also, there is a sign posted on the shore of Nonacho Lake by the Government of the NWT, advising people to limit their consumption of lake trout from the lake because of health concerns. Such public advisories will maintain concern over mercury in lake trout and other species caught in Nonacho Lake. Whereas it is true that the general populace in Canada is well aware of mercury as a potential human health concern (e.g. mercury in tuna), the special history of increased mercury in fish in Nonacho Lake and the posting of mercury concerns on the lake must be continuing to increase the public's concern regarding Nonacho Lake specifically.³⁵

...

Mercury is concluded in this report to be an ongoing impact of hydroelectric development in Nonacho Lake because of the publicity given to high levels in lake trout and consumption by people.³⁶

These are not scientific conclusions about mercury in fish. These are speculative statements about people's perceptions offered by Dr. Bodaly, who has no qualification to give this sort of opinion.

³⁵ Bodaly 2017 Report at pages 3 and 4.

³⁶ Bodaly 2017 Report at page 11.

The fact that the Carters are attempting to connect the presence of mercury in this manner highlights the lack of scientific basis to link mercury impacts with NTPC's operations under this Licence. If there were any scientific basis to link mercury impacts with NTPC's operations under this Licence (which there is not), it would be expected that the Bodaly 2017 Report would have discussed that, but it does not. Instead, the Bodaly 2017 Report offers a purely speculative and non-scientific connection based on an unqualified opinion with no supporting evidence.

In addition to the baseless comments regarding perceptions relating to mercury, the Bodaly 2017 Report offers the following gratuitous comments:

... the presence of woody debris certainly causes increased hazards to boating and affects the aesthetics of the shorelines, which must be impacting the quality of the experience for paying guests of the Carter family fishing lodge.³⁷

Here Dr. Bodaly attempts to draw a link between woody debris that was created during flooding events under past licences and the quality of the experience of patrons at the Nonacho Lake Lodge due to boating "hazards" and shoreline aesthetics. This opinion on the perceived experiences of patrons is completely speculative and clearly outside any area of expertise that Dr. Bodaly may have.

Not only are these comments by Dr. Bodaly out of place and lacking of any evidentiary foundation, they have resulted in Dr. Bodaly stepping beyond being an independent expert and into the role of an advocate for the Carter Family. As a result, Dr. Bodaly has put his own objectivity in questions and reduced the weight that should be given to the entire Bodaly 2017 Report. Given the out-of-scope and unfounded comments by Dr. Bodaly, NTPC respectfully submits that the Board is entitled to question the impartiality of Dr. Bodaly and ought adjust the weight given to the entire Bodaly 2017 Report accordingly.

Further, the woody debris complained of does not result from NTPC's operations under this Licence and there are not compensable in these proceedings.

³⁷ Bodaly 2017 Report at page 10.

Alternatively, and in addition to the submissions above, these statements about people's perceptions regarding mercury and decreased enjoyment from woody debris created under past licences do not relate to anything in the Cambria Gordon Report and therefore, violate the rule against case splitting as an improper attempt to add further evidence to bolster the position originally advanced by the Carters.³⁸

NTPC objects to all of Dr. Bodaly's evidence with respect to how mercury in the Nonacho Lake system is an "ongoing impact", and speculation of the perceived decreased enjoyment by patrons from woody debris. Accordingly, NTPC submits that the Board ought to disregard any statements along these lines in the Bodaly 2017 Report, and may question Dr. Bodaly's impartiality in general.

(3) Questions of Law

In addition, and in the alternative, NTPC submits that Dr. Bodaly's opinions in this regard should nonetheless be disregarded by the Board as the significance of the alleged connections, if any, are legal issues that Dr. Bodaly is not qualified to give an opinion on.

Whether an alleged connection between peoples' perceptions and ongoing impacts under this Licence meet the Carters' onus to prove their claim, is a question of law, or mixed fact and law, for the Board to decide pursuant to the Act. Dr. Bodaly is not a legal expert.

Accordingly, NTPC objects to all of Dr. Bodaly's evidence with respect to how mercury in the Nonacho Lake system is an "ongoing impact" and speculation of the perceived decreased enjoyment by patrons from woody debris, and submits that the Board ought to disregard any statements along these lines in the Bodaly 2017 Report. Further, NTPC submits that the attempt to answer this legal question in the Bodaly 2017 Report is a usurping of the Board's role, and ought not to be given any weight by the Board.

³⁸ *Krause v The Queen*, 1986 CanLII 39 (SCC), [1986] 2 SCR 466 at pp. 473-474 at **TAB D**.

IV. REPLY TO THE 2017 KRP REPORT

KRP's 2017 report contains two parts: 1) an executive summary of damages and 2) a response to the Odyssey Report.

The 2017 KRP Report contains two critical and fatal flaws, each of which renders its conclusions to be entirely without merit or weight for the Board in evaluating the economic losses claimed by the Carter Family.

The report firstly bases the claim on loss of future income by using lost patrons measured from a period (1979 to 1996) which is wholly inapplicable to the present and foreseeable circumstances of the Nonacho Lake Lodge during the term of the Licence and of the sport fishing industry of the Northwest Territories. Secondly, the report includes claims by the Carter Family for costs related to remediation of leased land, and for Lodge assets, which are not compensable under the Act.

Further, the report contains assertions and claims which are both outside the expertise of KRP and constitute a lack of independence of the expert by advocating positions on behalf of the Carter Family.

(i) Estimate of Lost Future Income

The estimate of "Loss of Income" of \$2,069,461 in the 2017 KRP Report is entirely dependent upon a projection of 165 lost patrons per annum for the entire licence period from 2012 through 2027.³⁹ This estimate of 165 lost patrons was derived by KRP in the 2012 Economic Loss Report (at para 7.01 on Page 23) and is calculated as follows:

Historical Average of Patrons at Nonacho Lake Lodge

1979 – 1996	218
1997 to 2011 (Excluding 2005)	53
Lost Patrons	165

³⁹ KRP assumes this 15 year period to run from August 31, 2012 through August 31, 2027. See footnote 1 of the 2017 KRP Report.

(1) Lost Patrons Estimate Lacks Support and is Nonsensical

There is no explanation or reasoning given in the 2017 KRP Report as to why 165 lost patrons per annum is a reasonable and valid assumption to support a claim for compensation for the licence period of 2012-2027. Schedule 3-1A of the report calculates lost patrons per year in Column D as 165 patrons, but there are no supporting footnotes or explanations given as to why the estimate should be used.

In its executive summary (on Page 1 of the KRP 2017 Report), KRP states that “we provide the following executive summary of the KRP Report, excluding any past losses otherwise disclosed in the KRP Report, and updated for the effective water licence period.” In effect then, KRP uses its 2017 report to provide what it asserts are the appropriate economic losses of the Carter Family for the 2012-2027 period. But the 2017 KRP Report is simply a rehash of its earlier (2012) report, revised to exclude past losses.

As such, it is important, and indeed critical, to recognize that the lost patrons calculation for the period of 2012-2027 is based upon the claimed business patronage at the Nonacho Lake Lodge for the period from 1979-1996. As noted above, the calculation of 165 lost patrons per annum assumes that the Nonacho Lake Lodge would realize the same number of average patrons per year from 2012 through 2027 as it did for the period from 1979-1996. These are the so-called 218 “Projected Patrons” used in the 2012 Economic Loss Report and duplicated in Schedule 3.1A, Column B of the 2017 KRP Report.

KRP’s simple assumption and/or conclusion that the Carter Family would realize patronage at the same average level for 48 years (1979 through 2027) is not only unsupported and unsubstantiated by KRP, it is ultimately nonsensical.

To suggest that any business, let alone a family business operating in a highly competitive industry out of a remote location, would operate at the same sustained level for a period of 5 decades, is absurd. At a minimum, such assumptions should be supported by credible evidence, including independent verification of industry factors

and trends, in order to be accepted and relied upon by the Board to award the significant losses claimed. KRP and the Carter Family have provided no such evidence in these proceedings.

More particularly, KRP has not filed any evidence to support why the Carter Family would have realized 218 Projected Patrons at the Lodge per year for the entire licence period of 2012-2017 period, but for NTPC's Taltson operations.⁴⁰ There is also no evidence as to why this estimate is reasonable for this period, given that it is based upon the average patronage at the Lodge from a prior period that is many decades (1979-1996) earlier.

Indeed, the scope of the information reviewed by KRP in the 2012 Economic Loss Report (para 4.01 (h) on Page 12) includes the following:

"Information obtained from correspondence and discussions with the Carter Family, inclusive of:

- An itemization of the historical patronage, per annum, of the Nonacho Lake Lodge" [emphasis added]

It is clear then, that KRP relied upon patronage information provided by the Carter Family to derived Projected Patronage estimates, and ultimately the Loss of Patrons calculation of 165 persons per annum for the 2012-2017 period.

It is equally clear that KRP made no effort to check, validate or verify the past or projected Lodge patronage information given to it by the Carter Family in preparing the 2012 Economic Loss Report:

"4.02 We have not audited or otherwise verified the information relied upon in preparing our report. Our engagement does not constitute an audit and we express no assurance opinion on the documents provide to us."

⁴⁰ KRP defines "Projected Patrons" in the 2012 Economic Loss report (para 3.01 on Page 3) as "the estimated number of patrons that would have visited the Nonacho Lake Lodge, excluding the effect(s) of the operations of the Taltson Facility by NTPC."

The limitations in the scope of KRP's engagement by the Carter Family confirm that KRP was not instructed to, and made no effort, to independently verify the patronage claims of the Carter Family, including the nonsensical and unsupported claim that the Lodge would have the same average patronage for a period of 48 years.

The Odyssey Report (Appendix A) provided independent and objective data from the GNWT that Fishing Tourism visitation and spending trends in the Northwest Territories from 2006 through 2011 fell steadily and sharply throughout this period. This casts significant doubt upon the claims of the Carter Family that Lodge patronage would remain not only steady throughout the 2012-2027 period, but would have stayed at the average level seen during 1979-1996, but for NTPC's operations of the Taltson Facility.

The negative industry trends previously identified by Odyssey in 2012 continue for the sport fishing industry. For example, a study of the industry conducted in 2014 noted the following:

The Northwest Territories (NWT) overnight sport fishing sector has faced a series of external trends that have led to a decline in visitation over the last decade. This has resulted in a consolidation of NWT lodges, with some closing their doors and others no longer investing or marketing their products.⁴¹

Importantly, studies have also shown that the NWT sport fishing industry is subject to factors outside of the NWT:

Reasons for the decline are not only affecting the NWT, rather are influenced by trends experienced across Canada and globally.

Negative factors cited in the secondary research and stated by lodge owners that have led to declines include:

- There are fewer anglers in general;
- Anglers are aging and not being replaced by newer ones;
- The downfall of the US economy;
- Changes in American travel patterns post 9/11;
- Border issues and Canada/US relations;
- Other more "exotic" global fishing opportunities;
- Decline in corporate travel market;
- The ban on caribou hunting;

⁴¹ See TAB E, *Competitive Analysis of the Outfitted Recreational Sport Fishing Sector of the Northwest Territories March, 2014*, Dennis Zimmermann, Executive Summary, Page 4.

- Unfavorable exchange rates; and
- Higher operator costs.⁴²

Against the clear backdrop of declining industry trends as studied and confirmed by independent and objective sources with no pecuniary and monetary interest, the Carter Family's lost patronage claims are again, nonsensical and void of realism.

(2) Loss of Income is a Claim Based on Past Losses

KRP's 2012 report (para 6.02 on Page 16) shows that starting in 1995, and continuing through 2011, patronage at the Lodge fell steadily and precipitously from prior periods. The report also provided a graph of Nonacho Lake water levels (para 6.05 on Page 17) which clearly shows that waters levels from 1995 through 2010 fluctuated on a regular annual basis, similar to prior periods.

In the 2012 Economic Loss Report, KRP wrongly, and without direct evidence of causation, asserted that this drop in patronage arose due to the operations of NTPC's Taltson facility. This assertion however was based upon Carter Family representations and as noted above, was made without any independent verification by KRP.

The Odyssey Report had addressed reasons why the Lodge may have lost patronage in the mid 1990's. KRP has attempted to respond to certain of these matters, and their responses will be addressed below in these submissions.

In its 2012 report, KRP also wrongly concluded (para 6.03 on Page 16) that effects on fish in 1979 and "the 1990's" are an "impact on the operations of Nonacho Lake Lodge".⁴³ However, even if this assertion was correct, these effects occurred as a matter of fact in prior periods, as did the claimed lost patronage of 165 persons (on average) occur in a prior period (1996-2011). Therefore, the claim of the Carter Family for 165 patrons for the period of 2012-2017 for fish effects occurring in 1979 and the

⁴² *Ibid*, Pages 7-8.

⁴³ KRP noted (without reference to independent scientific data) that certain fish species have not been caught since the 1970s and that in the 1990's smaller catches of remaining fish were being reported.

1990's due to NTPC's operations are not only false and not proven, they are also a claim for past losses, which is contrary to Justice Shaner's decision.

(ii) Future Out of Pocket Costs

The KRP 2017 Report (Page 2 and Schedule 4A) includes an update or revision to a claim for future "out-of-pockets costs" (stated in March 1, 2012 dollars), as follows:

Future costs related to clean-up costs related to water levels	\$ 60,070
Future Costs of Assets at end of Water Licence	591,713
Future Costs of Reclamation at end of Water Licence	253,330
	\$905,113

Each of these claims are without merit and should be disregarded completely.

(1) Future Clean-Up Costs Related to Water Levels

Although not readily identifiable from the materials provided in the KRP 2017 Report, this claim appears to be based on items set out included in Appendix 4-1A and include 2012 costs such as Shed Costs and Wooden Dock Costs, as well as damage to boats and outboard motors.

These claims are bald and unsupported and should therefore be denied. There is simply no evidence provided which demonstrates how "water levels" and indeed how NTPC's Taltson Operations have caused the claimed losses. In the absence of causation being demonstrated, such losses must be denied.

Moreover, if facilities such as docks and sheds were placed by the Carter Family too close to the lakeshore, there would be a breach of its lease with Her Majesty. Clause 29 of the lease provides that no facilities shall be placed within 31 meters of the ordinary high water mark, without written approval from the Minister. There is no evidence that the Carter Family obtained this approval from the Minister.

According to the figure representing Nonacho Lake Water Levels located at tab 8 of the Carter 2012 Response, the high water mark has reached or exceeded 321.5 meters on five occasions between 1971 and 2009. This figure shows that the high water mark between seasons remains relatively constant between 320.5 and 321.5 meters. This means that the high watermark has remained relatively consistent throughout the operating life of the Taltson Facility. It is apparent from the photographs included at page 6 of the Economic Loss Report that several cabins and other facilities are located well within the 31 meters of the high water mark, contrary to the terms of the lease. There is no evidence that written approval from the Minister has been obtained relative to these clear breaches of the lease. As such, NTPC should not be required to compensate the Carter Family for any losses that could have been prevented, had the Carter Family followed the provisions of its lease.

(2) Future Costs of Assets at end of Water Licence

Schedule 4-1A of the KRP 2017 Report details claimed losses of \$891,000 incurred by the Carter Family in 2027 related to the “Value of Capital Assets (Net of Salvage)”.

These losses are not compensable under Act as they are not related to the proposed use of waters by NTPC, are inappropriate in any event, and therefore should be fully and completely denied by the Board.

The claimed losses are detailed in Note (6) to the Schedule, and are noted to be “as represented by the Carter Family”. Again, as noted above, this confirms that given the scope limitations of the KRP reports, no independent audit or verification has been conducted by KRP on the Carter Family claims.

(3) Claims Not Compensable Under Law

Legislation only permits the Board to award losses for claims in relation to loss, damage or adverse effect. The Act does not provide the Board with the powers or jurisdiction to order an applicant or licence holder to pay for the value of assets of a user of waters at the end of a licence term. There is no basis in law for the Board to make such orders.

Moreover, the claimed amounts are not compensable in any event, because they are not a loss suffered by the Carter Family which is connected with the operation of the Taltson Facility during the term of the Licence. The amounts are simply an estimate of the Carter Family as to the value of the assets of the Lodge (and other assets) at the end of the term in 2027. There is no evidence that this estimated value in 2027 was diminished as a result of NTPC's operations from what it otherwise might be, or that the assets cannot be used or sold at that time due to those operations. Instead, the claim surfaces "out of thin air", and is relied upon by KRP without any follow up or verification as to its merits as a valid and reasonable claim of economic loss.

The asset value claims are also inconsistent with the notion that the Nonacho Lake Lodge is a Carter Family legacy and "their life" (2017 KRP Report, Page 8). If indeed the family intends to operate the Lodge into the future (including after 2027), NTPC should not be required to compensate the Carter Family for assets which will continue to be used in the operation of the Lodge after 2027. This type of compensation is not provided for in the Act and would be an error of law for the Board to award.

(4) Losses are Not Provable nor Probable

A claim for the value of assets in 2027 is not compensable at law under the Act because there is no basis for the Board to conclude that the Lodge will be in operation as of 2027. The lease for the lands upon which the Lodge operates expires on March 31, 2022. There is no evidence indicating that the Lodge will operate beyond that date. As such, the claimed loss in 2027 for assets at the end of the Licence is neither provable nor probable, as required under the Act. The claim must therefore fail.

(5) Reclamation Costs at end of Water Licence

Schedule 4-1A of the 2017 KRP Report provides an amount of \$253,330 as the present value of anticipated reclamation costs to be incurred by the Carter Family at the end of the Licence term in 2027.

The claim for reclamation costs in 2027 was addressed fully and completely in the NTPC 2012 Response, and nothing in the 2017 KRP Report rebuts or refutes NTPC's submissions in any way; these submissions are repeated and summarized below:

- The Carter Family will be responsible for reclamation costs at the end of the lease term in 2022 regardless of the Taltson Facility operations;
- Any costs of reclamation are a liability of the Nonacho Lake Lodge arising from its use of the leased land, and payable by the lessor at the termination of the lease under clauses 12, 13 and 14 of the lease;
- There is no evidence indicating that the Nonacho Lake Lodge will operate beyond the March 31, 2022; the lease terminates on that date and there is no right of renewal; and
- The Carter Family has operated the Lodge in breach of the lease's prohibition on constructing facilities within 31 meters of the ordinary high water mark of Nonacho Lake.

Moreover, there is no evidence to demonstrate what the "baseline" remediation and reclamation costs would be in the absence of NTPC's operations, and what those costs would be due to NTPC's operations. Instead, it appears that KRP is relying upon a quote obtained by the Carter Family (Note (5) to Schedule 4-1A of the KRP 2017 Report) which estimates the entire cost of reclamation of the Lodge and an outpost camp. This evidence cannot be relied upon by the Board to award damages, because there is no estimate of "baseline" costs that would be incurred by the Carter Family in the absence of NTPC's operations. Without baseline costs, there is no basis for the Board to find provable or probable damages, as required under the Act.

In the alternative, if the "baseline" reclamation costs is estimated by the Carter Family to be \$0, the estimate is nonsensical and should be disregarded by the Board. It is entirely unreasonable for the Carter Family to assert that it would have no reclamation and restoration costs for the Lodge, when it has admitted that the Lodge operations include

docks, 8 cabins, generators and the like at the Lodge site. These items will have to be removed and the land restored by the Carter Family at its cost under the terms of the lease. NTPC's operations have nothing to do with these obligations, and NTPC should therefore not be required to pay for them.

(iii) KRP Response to Odyssey Report

As noted above, the Economic Loss (loss of income) estimate of KRP is fatally and fundamentally flawed, and cannot be relied upon by the Board in any way, because it relies upon the nonsensical and untenable proposition that the Carter Family should be compensated for each year from 2012-2027 at a projected patronage level taken for the Lodge from a period decades earlier, and as far back as 1979.

The KRP 2017 Report has attempted to provide a response to certain submissions contained in the Odyssey Report. Set out below are certain points which NTPC wishes to raise with respect to the KRP response. However, fundamentally, the KRP materials fail for the reasons set out above in these submissions. As such, the Board cannot and should not award the Carter Family any compensation for economic losses, regardless of the KRP response to the Odyssey Report.

(1) Providing Opinions Where Not Qualified and Acting as an Advocate

As was the case with Dr. Bodaly and described above, KRP is providing opinions in its report on areas which are outside of its expertise. Further, KRP's report contains statements and positions reflective of an advocacy role, and not that of an independent and objective expert.

KRP criticizes Odyssey (Page 5 of KRP 2017 Report) for not acknowledging or recognizing that the "water level on Nonacho Lake has fluctuated materially", and then references its own prior (2012) KRP report as evidence of this asserted fact.

KRP is not qualified as experts on water level fluctuation generally, and in particular what are "material" fluctuations of water levels. Equally, KRP is a qualified expert as to what effects might arise from such fluctuations, should they occur. NTPC has always

operated its Nonacho Lake facility within the tolerances of the water licence for the Taltson Facility established by the Board and its predecessors with stakeholder engagement, and proposes intends to do so in the future.

It is obvious from KRP's wandering out of its area of expertise that KRP is unable to recognize or appreciate that NTPC operates the Nonacho structure and the Taltson Facility as a run-of-river facility, and any water level fluctuations arise, including at Nonacho Lake, as a result from natural flow patterns.

KRP also relies (page 6) on water level fluctuations and "conditions" at Nonacho Lake to opine that these conditions are the "most influential" to repeat patronage at Nonacho Lake Lodge. This reliance is made primarily to suggest or imply that Nonacho Lake is somehow different and immune from the demonstrated industry trends noted in the Odyssey report (and Tab E) on the decline of patronage and spending on sport fishing in the Northwest Territories.

Just as KRP is not qualified to opine on the effects of water level fluctuations, it is also not qualified to opine on the sport fishing industry in the Northwest Territories. Odyssey took the proper approach to assessing the industry, by relying upon objective and independent data and information to inform its opinions. KRP on the other hand, has relied upon "correspondence and discussions" with the Carter Family, without any independent verification of the representations and claims made by their financially motivated and self-interested client.

(2) KRP as Advocate

By stepping outside of its role as an expert and stating opinion on matters such as industry trends and the effects of water level fluctuations, KRP is adopting an advocacy role on behalf of the Carter Family.

The advocacy role is also displayed when KRP attempts to refute (Page 8) the application by Odyssey of a business valuation calculation with respect to the Lodge. Part of the KRP response relates the valuation methodology, but the principal point of

rebuttal of KRP is that the Lodge is “their life” and normal valuation principles do not apply. KRP then offers no commonly accepted or used valuation alternative in response to Odyssey. As an independent, objective expert, KRP should provide an alternative, and its failure to do so raises a presumption that it is advocating for its client by not doing so.

The materials in Tab E⁴⁴ show that many operators of sport fishing lodges have sold or are considering selling their operations in the face of declining industry conditions. The Odyssey Report (Section 7 on Page 26) provided a valuation estimate of \$50,000 to \$150,000 for the Nonacho Lake Lodge, before consideration of remediation costs, and NIL including remediation costs.

KRP provided no valuation alternative to the Odyssey estimate and instead simply dismissed it. KRP asserted that if “notional staff and guides” expenditures used by Odyssey were excluded from valuation calculations to account for the fact the Carter family are the “predominant” staff and guides at the Lodge, the Odyssey valuation calculation would be over 3 times that estimated by Odyssey.

Despite the claims of KRP that the Odyssey valuation is not appropriate, it is clear that Odyssey’s valuation estimate and evidence from 2012 is highly reflective of recent sale transactions and offerings in the NWT marketplace⁴⁵ for operations comparable to Nonacho Lake Fishing Lodge:

Lynx Tundra Lodge: Trophy Fishing and Wilderness Adventures

- Asking price \$195,000
- Location: Lynx Lake, 260 miles east of Yellowknife
- 4 guest cabins (192 sq ft to 320 sq ft each), lodge building (960 sq ft).
- 7 boats

Mackay Lake Lodge, Fishing

- Asking price \$329,000
- Lodge building (1,200 sq ft)
- 6 guest cabins
- 3,500 foot airstrip

⁴⁴ See Tab E, Page 7, and also reference to footnote 3.

⁴⁵ Taken from <http://www.mccowans.com/listings/fishing-lodges>.

- 5.2 hectare lease

Aylmer Lake Lodge

- Sold, asking price was \$60,000
- 2.3 hectares
- Lodge and 7 cabins

Tourism license on Thonokied Lake

- Sold, asking price was \$30,000
- 0.5 hectares land lease

Fishing Lodge on White Wolf Lake

- Sold, asking price was \$150,000
- Approximately 0.5 hectares
- 180 miles north of Yellowknife
- Five boats
- Occupancy for 6.

Odyssey's valuation approach and assumptions are far more reflective of the industry conditions and actual industry transactions than the evidence provided by KRP.

(3) No Response to Odyssey's Reasonableness Check

The Odyssey Report included a discussion and analysis (paras 5.42 through 5.44, Tables 9 and 10) on the reasonableness of the KRP loss calculations contained in the 2012 KRP Report.

Odyssey concluded that the loss of income calculated by KRP for the loss period (30 years from 1997 through 2027) equated to 79.1 years of expected earnings based on industry norms as of 2005, and could be as high as 105.8 years of earnings. This suggest that KRP's loss calculations could be 2.5 times to 3.5 times too high from what they should be.

Importantly, to derive its industry norms as of 2005 for the NWT fishing industry, Odyssey relied upon an objective, independent study of NWT fishing outfitters which was contained in the Odyssey Report.

Moreover, in its 2017 report, KRP has not responded to the Odyssey analysis and conclusions on the reasonableness of the KRP loss calculations made in 2012.

Odyssey's findings therefore are credible, and independent, and should be accepted by the Board as evidence that the KRP analysis and methodology results in loss estimates that are significantly excessive.

Odyssey's conclusions are not surprising. As noted above, what KRP has done to prepare its loss calculations is to rely completely on the representations and claims of fact from the Carter Family, without any independent verification. The Carter Family has a clear and direct pecuniary interest to maximize its financial windfall in this proceeding. The two elements, taken together, result in the nonsensical and untenable estimates of economic loss being advanced by the Carter Family and its experts.

(4) Use of Industry Benchmarks a Check on Reasonableness

The 2017 KRP Report (Page 7) takes issue with Odyssey's use of industry benchmarks in evaluating the normalized expenses of the Nonacho lake Lodge. In particular, KRP states the use by Odyssey of a 23.6% (percentage of revenue) benchmark for staff and guides is inappropriate given that the Carter family performs the staff and guide functions at the Lodge.

Despite KRP's claim, reference to industry benchmarks for staffing costs is important and relevant to assess the reasonableness of the lost contribution claimed by the Carter Family. The methodology used by KRP in establishing Contribution Margin estimates in Schedule 2-1A and Schedule 3-1 (note 4) of the 2012 Economic Loss Report results in a margin which excludes staffing costs, and thus approximates what the Carter Family is seeking to provide for their time and effort in providing staff and guide functions at the Lodge.

The Contribution Margin percentage of Lodge revenues assumed and used by KRP is 43.67%, or almost double the industry norm for payments to staff and guides. This serves as another reasonableness check on the excessiveness of the claims of the Carter Family. There is simply no credible basis as to why the Carter Family members should be paid double the going rate in the industry for providing staff and guide functions.

V. CONCLUSION

In its response to the Carters in 2012, NTPC made the following concluding remarks:

- the Carter Family has not provided satisfactory evidence to demonstrate that its alleged losses will be caused by the operation of the Taltson Facility by NTPC during the term of the Licence;
- the evidence supporting the Carter Family claim is made up of personal observations and assertions, clearly made to gain a personal financial benefit;
- the Carter Family claim should be denied in its entirety; and
- in the event the Board finds that the use of waters by NTPC in connection with the operation of the Taltson Facility gives rise to compensable losses, including for nuisance or inconvenience, the maximum amount compensable should be related to the current fair market value of the Nonacho Lake Lodge, estimated in the Odyssey Report to be between \$50,000 and \$150,000, before deduction of reclamation costs.

These submissions remain equally valid today. Nothing provided in the expert reports provided by Dr. Bodaly or KRP on behalf of the Carter Family overcomes the fundamental and necessary evidentiary burden at law to demonstrate that NTPC's operations have caused the claimed losses. The lack of demonstrated causation must result in the claim of the Carter Family being rejected by the Board.

Moreover, it is clear that the claimed economic losses are fundamentally and fatally flawed, and should be rejected by the Board outright in any event.

This completes the submissions of NTPC.