



NORTHERN PULP
NOVA SCOTIA CORPORATION
A PAPER EXCELLENCE COMPANY

Written Submission to

Law Amendments Committee

By

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About

Bill No. 143 – Boat Harbour Act (amended)

April 13, 2022

Thank you for the opportunity to make written submissions to the Committee today in connection with amendments to the *Boat Harbour Act*, SNS 2015, c. 4 (the “**BHA**”) proposed pursuant to Bill 143.

The purpose of Bill 143 is not to clarify the scope of the provisions in Section 4 of the BHA limiting actions against the Province, but to materially expand its scope and effect and retroactively release the Province of Nova Scotia (the “**Province**”) from contractual and other liabilities. The scope and effect of Section 4 of the BHA at the time of its enactment was restricted to limiting remedies in connection with the lease of the Boat Harbour Effluent Treatment Facility (the “**BH-ETF**”) resulting from the forced reduction in the term of the lease. At the time of its enactment, the Province was keenly aware of its obligations under other agreements with Northern Pulp Nova Scotia Corporation (“**Northern Pulp**”) and specifically chose to stay silent with respect to such obligations in the BHA. Multiple public officials acknowledged the continuation of these obligations of the Province to Northern Pulp. The proposed amendments to Section 4 in Bill 143 seek to eliminate all of the Province’s obligations under agreements with Northern Pulp. They are not a clarification but a wholesale subversion of the intent of Section 4 of the BHA, thereby seeking to deprive Northern Pulp and others of their legal rights and remedies and facilitating the

Province's complete abdication of responsibility with respect to its obligations under agreements with Northern Pulp.

Northern Pulp is legitimately seeking compensation for the wrongs done to it by the Province. If the Province expropriates your home, the *Expropriation Act* requires that it pay just compensation. The legal principles and the rights to receive compensation are the same here.

Bill 143 is highly detrimental to the long-term public interest of Nova Scotia. It will send a very chilling message to anyone contemplating investing in Nova Scotia that the word and contractual obligations of the Province will not be honoured and may be taken away at the whim of the government. If passed, the risks of doing business in Nova Scotia will be raised to an unprecedented level. Businesses need certainty and fairness; serious and professional business persons will not invest in jurisdictions where governments breach contracts and ignore their obligations, enact laws to retroactively wipe out their obligations and abdicating responsibility from all such obligations, and provide no compensation whatsoever for the unfair and extremely prejudicial extinguishment of legal rights.

I. INTRODUCTION

Northern Pulp owns and previously operated a pulp mill (the "**Mill**") that discharged effluent into the BH-ETF in Pictou County, Nova Scotia. On January 12, 2020, Northern Pulp was forced to cease producing pulp at the Mill and using the BH-ETF for its intended purpose by reason of the provisions of the BHA and a subsequent decision made by the Province on or about December 17, 2019 to not defer the implementation of the closure of the BH-ETF. Northern Pulp has acted in full compliance with an order of the Minister of Environment issued on January 29, 2020 ordering Northern Pulp take steps to effect an orderly shutdown of the Mill, and to continue to use the BH-ETF for such purposes. The forced closure of the BH-ETF left Northern Pulp with no ability to treat pulp effluent at the Mill and resulted in the forced cessation of commercial operations at the Mill.

The closure of the Mill and cessation of pulp production resulted in 302 employees being laid off, and has had a devastating effect on Northern Pulp, its affiliates and their partners in the forestry industry. As a result of the forced shutdown of the Mill, Northern Pulp and certain affiliates (collectively, the "**Petitioners**") were required to seek protection under the *Companies' Creditors Arrangement Act*, c. C-36, as amended (the "**CCAA**") pursuant to proceedings (the "**CCAA Proceedings**") commenced in June 2020. The CCAA Proceedings were commenced to ensure

compliance with regulatory requirements, to place operations into hibernation in a responsible and sustainable manner, to provide additional time to pursue potential restructuring alternatives including seeking approvals required for a replacement facility for the BH-ETF (the "**Replacement ETF**"), and to provide time and a framework for re-engaging in settlement discussions ("**Settlement Discussions**") with the Province, Pictou Landing First Nation ("**PLFN**") and other stakeholders with a view to amicably and constructively resolving all outstanding issues.

As described in further detail in these submissions, the Province ceased engaging in Settlement Discussions in 2018 and has since presented Northern Pulp with a series of constantly changing conditions precedent to re-engaging in Settlement Discussions. Instead of cooperatively engaging in Settlement Discussions, the Province requested that Northern Pulp commence litigation so that the Province could evaluate the claims and the evidence supporting the claims. The Petitioners together with Paper Excellence Canada Holdings Corporation ("**PEC**") and Hervey Investment BV (Netherlands) ("**Hervey**" and collectively, the "**Plaintiffs**") were therefore forced, at the specific request of the Province, to file a Statement of Claim (the "**Statement of Claim**") on December 16, 2021 in the Nova Scotia Supreme Court, Hfx No. 511473 commencing litigation against the Province related to the closure of the Mill (the "**Northern Pulp Litigation**") in order to ensure certain limitations were not missed and to preserve their legal rights and remedies. This filing of the Statement of Claim was not only specifically requested by the Province, but more importantly, a necessary step to preserve the legal rights of the Plaintiffs who nevertheless continued to seek settlement discussions with the Province, including by seeking independent mediation in the CCAA Proceedings.

An order was granted on April 1, 2022 in the CCAA Proceedings (the "**Mediation Order**"), among other things, appointing the Honourable Thomas Cromwell, CC to act as a neutral third party to mediate a settlement of certain claims, including those made in the Northern Pulp Litigation, notwithstanding the opposition of the Province.

The Province's March 18, 2022 response to the application for the Mediation Order (the "**March 2022 Province Response**") stated that request for the appointment of a mediator and a tolling and suspension of all deadlines in the Nova Scotia Litigation was not appropriate for reasons that included the following:

- (a) The Province's position is that it has no liability to the Plaintiffs as a result of the *Boat Harbour Act*, which provides a full defence to the Plaintiffs' claims through section 4:

4(1) No action lies against Her Majesty in Right of the Province or a member of the Executive Council in respect of the cessation of use of the Facility for the reception and treatment of effluent from the Mill as a result of this Act.

(2) The enactment of this Act is deemed not to be a repudiation or anticipatory repudiation by Her Majesty in Right of the Province of the Lease Agreement dated December 31, 1995 between Her Majesty in Right of the Province and Scott Maritimes Limited, as extended by a Lease Extension Agreement dated October 22, 2022 between Her Majesty in Right of the Province and Kimberly-Clarke Inc.

- (b) The Province's willingness to negotiate assistance for Northern Pulp is predicated upon it being in the public interest of Nova Scotians and upon the preservation of the integrity of the environmental assessment and approval processes and the discharge of its duties to consult with First Nations;
- (c) The Province does not deem it to be in the public interest to engage in such negotiation at this time;
- (d) The request for mediation was made shortly after the Nova Scotia Litigation was begun, with the Statement of Claim filed on December 16, 2021 and, in particular:
- (i) pleadings have not closed; and
 - (ii) there has been no document disclosure;
- (e) The request for a suspension of all deadlines in the Nova Scotia Litigation, including precluding the filing of a defence by the Province, undermines the Province's right to make a full defence in reliance upon the procedural protection of the *Nova Scotia Civil Procedure Rules*. It interferes with a full exploration of the evidence and the merits of the positions of the parties. Instead, it suggests a monetary settlement is guaranteed and promotes an expectation that the Province should be offering such a settlement, contrary to the Province's position;

The Province did not disclose any plans, intention or need to further amend the BHA in the March 2022 Province Response. Further, the Province made no reference to this necessity or possibility

in its oral arguments at the CCAA Proceedings in the context of the consideration of the Mediation Order. Indeed, the intended scope and effect of the proposed BHA amendments are entirely inconsistent with the position stated in the March 2022 Province Response and in the arguments made by the Province in the CCAA Proceedings. For example, the Province did not disclose any need to make substantial revisions to the BHA in order for the BHA to provide a complete defence. It also failed to disclose that the proposed amendments to the BHA under consideration at that time would dilute or eliminate the benefit of proceedings pursuant to Nova Scotia *Civil Procedure Rules* that the Province proposed to rely on in paragraphs (d) and (e) of the March 2022 Province Response and instead elected to blind side Northern Pulp with these proposed amendments days after the Mediation Order was entered. It is now clear that the Province was not engaging in the CCAA Proceedings in good faith, both in its interactions with Northern Pulp as well as the CCAA judge, to whom none of this was previewed.

Having been unsuccessful in opposing the Mediation Order, the Province now seeks to substantially amend section 4 of the BHA pursuant to Bill 143, as follows (in underline):

4(1) No action including any action for damages or any other compensation lies against Her Majesty in right of the Province or a member of the Executive Council, their officers, employees or agents for any claims or causes of action, whether based in law or equity in respect of the cessation of the use of the Facility for the reception and treatment of effluent from the Mill as a result of this Act.

(2) Repealed

(3) For greater certainty, subsection (1) includes all claims and causes of action seeking damages and other relief as currently pleaded in the Supreme Court of Nova Scotia. Hfx. No. 511473. Northern Pulp Nova Scotia Corporation et al. v The Attorney General of Nova Scotia.

The CBC has reported the following statements made by Dana MacKenzie, associate deputy minister, Department of Justice describing the purpose of the proposed amendments to the BHA:

"Dana MacKenzie, the province's associate deputy minister of justice, said Thursday the government's position had not changed.

"This is just ensuring that there is absolutely clear language and unambiguous language about what 2015's legislation was intended to do," said MacKenzie, who briefed reporters on the proposed changes.

Northern Pulp submits that the proposed amendments to Section 4 of the BHA are substantial and highly material revisions that do not “clarify the original intent of the BHA”. The original intent and effect of the BHA was not to remove Northern Pulp's rights to compensation, as described in detail in these submissions. The Province could not have contemplated in 2015 the subsequent actions and events that would result in the causes of action described in the Northern Pulp Litigation. How could this possibly have been their original intent?

Northern Pulp further submits that the amendments to Section 4 of the BHA are clearly and specifically intended to entirely remove the legitimate rights of the Plaintiffs to the compensation sought pursuant to the Northern Pulp Litigation and provide the Province with the “complete defence” it lacks. This is a direct response to the Mediation Order being granted and the Province no longer being able to delay and avoid dealing with its obligations to Northern Pulp. The Province had three months to evaluate the claims in the Northern Pulp Litigation and the supporting evidence. Rather than filing a statement of defence or engaging in good faith mediation to resolve such claims, it now seeks to use its legislative authority to retroactively eliminate them.

Northern Pulp further submits that such amendments are not in the public interest or in any way consistent with the obligations of the Province pursuant to the CCAA Proceedings, including the Mediation Order. It is not in the public interest for the Province to attempt to evade its obligations under agreements with Northern Pulp and also to evade its obligations pursuant to the CCAA Proceedings by amending the BHA as proposed. The Supreme Court of Canada has stated in *Wells v Newfoundland* [1999] 3 S.C.R. 199, para 46

In a nation governed by the rule of law, we assume that the government will honour its obligations unless it explicitly exercises its power not to. In the absence of a clear express intent to abrogate rights and obligations – rights of the highest importance to the individual – those rights remain in force. To argue the opposite is to say that the government is bound only by its whim, not its word. In Canada this is unacceptable, and does not accord with the nation's understanding of the relationship between the state and its citizens.

Passing the proposed amendments to Section 4 of the BHA in this Bill will send a very chilling message to any investor that is contemplating investing in this Province and could potentially impact investor sentiment in other parts of Canada. The Statement of Claim seeks damages related to the Province's refusal to indemnify Northern Pulp in connection with litigation

commenced by PLFN related to Boat Harbour. The protection provided by this indemnity (as discussed in these submissions) was a fundamental condition for owners of the Mill (including Northern Pulp) to agree to lease the BH-ETF from the Province or assume the obligations under such lease. Northern Pulp fully and specifically relied on the existence of these rights when it purchased the Mill and invested in the Province of Nova Scotia and to that end, requested (and received) the benefit of explicit acknowledgments from the Province with respect to such rights. To retroactively remove the protection provided by such indemnity now is egregious and contrary to the public interest. How will any future investor in Nova Scotia be able to trust the Province?

Based on the foregoing and the other submissions made below, it is clear that the Bill should not be passed.

Northern Pulp submits that it would be in the public interest for the Province to engage in good faith mediation with the Petitioners pursuant to the Mediation Order to reach a settlement agreement that permits the Mill to restart.

In order to understand the submissions of Northern Pulp on Bill 143, it is necessary to set out some background and history of the Mill, the use of land adjacent to Boat Harbour as an effluent treatment site, the related agreements between the Province and owners of the Mill, the events leading to the passing of the BHA requiring Northern Pulp to cease using the BH-ETF for the reception and treatment of pulp effluent, the intent of the BHA at such time and as evidenced by statements and action of premiers and other representatives of the Province, subsequent Settlement Discussions and actions by the Province confirming such intent, and recent events in the CCAA Proceedings that have precipitated the Province's decision to seek the proposed amendments to the BHA.

II. BACKGROUND

The Mill had been in operation since its construction by Scott Maritimes Limited ("**Scott**") in 1967. The Mill was subsequently sold to and operated by Kimberly-Clark Inc. ("**KC**", from 1995 to 2004), Neenah Paper Company of Canada ("**Neenah**", from 2004-2008), and Northern Pulp (from 2008 to the discontinuance of its operations in January 2020).

Northern Pulp (as successor to Scott) and the Province are parties to a number of agreements concerning the operation of the Mill, including, among others, the following:

- (a) the rights to a license to use Crown land pursuant to the agreement attached to the *Scott Maritimes Limited Agreement (1965) Act*, R.S.N.S. 1989, c. 415;
- (b) a memorandum of understanding dated December 1, 1995 (the "**MOU**"), which includes, in part, covenants from the Province that it will (i) impose operating limits on Northern Pulp that reflect (without exceeding or applying more stringently) the standards set out in the Pulp and Paper Effluent Regulations (Can.) (the "**PPER**"); and, (ii) use its best efforts to assist Northern Pulp to obtain all necessary permits, consents and approvals to permit the construction and operation of a replacement effluent treatment facility to replace the Facility at the expiration of the term of the Lease;
- (c) Lease Agreement dated December 31, 1995 (the "**Lease**"), as between Northern Pulp and the Province, as subsequently amended and extended pursuant to the Lease Extension Agreement, dated October 22, 2002 (the "**Lease Extension**"), authorizing Northern Pulp to operate the BH-ETF until December 31, 2030;
- (d) a license agreement dated December 31, 1995 (the "**License**"), providing the right to use lands owned by the Province (the Boat Harbour stabilization basin) for the purpose of transmitting effluent from the BH-ETF to the Northumberland Strait;
- (e) an indemnity agreement, dated December 31, 1995 ("**Indemnity Agreement**"), whereby the Province indemnified Northern Pulp (as successor to Scott) and its officers, directors, shareholders, employees, agents, consultants, advisors and their respective heirs, successors (including successors in title), assigns, and legal representatives, shareholders and their respective officers, directors, shareholders, employees, agents, consultants and advisers from, amongst other things, any and all liabilities, losses, claims, demands, actions, causes of action, damages, (including, without limitation, lost profits, consequential damages, interest, penalties, fines and monetary sanctions) including amounts paid to settle actions, whether before or after litigation or other proceedings or activities of any nature, or to satisfy judgments, orders or directives including, without limitation, any judgment,

order or directive imposing joint and several liability on the Indemnified Parties and any costs (including the cost of diverting or altering components of the Facility in response to Claims), liability or damages arising out of the construction or location of the BH-ETF;

(f) a water supply agreement between Northern Pulp (as successor to Scott) and the Province, dated June 30, 1995; and

(g) an acknowledgement agreement by the Province, dated May 12, 2008, in favor of NPNS LP, its affiliates, and Northern Pulp ("**Acknowledgement Agreement**") acknowledging that the agreements listed above were in good standing and will continue in full force and effect for the benefit of Northern Pulp,

(collectively, the "**Agreements**").

The process of producing pulp at the Mill creates wastewater that must be treated before discharge. The wastewater created by the Mill has been pumped to and treated at the BH-ETF since 1972. The BH-ETF is adjacent to a body of water commonly known as "Boat Harbour" and to the reserve set apart by Her Majesty the Queen in Right of Canada for the use and benefit of PLFN and other lands owned or controlled by PLFN. Boat Harbour feeds into the Northumberland Strait on the southern part of the Gulf of Saint Lawrence.

The BH-ETF is owned by the Province and was operated by the Province pursuant to agreements with owners of the Mill from 1972 until entering into the Lease in 1995. The protections provided by the Indemnity Agreement were fundamental conditions necessary for all owners of the Mill to assume the responsibilities pursuant to the Lease, given the past operation of the BH-ETF by the Province. Northern Pulp operated the BH-ETF pursuant to the Lease and the Lease Extension from 2008 until January 30, 2020 relying on these protections. The Province now seeks to retroactively remove these protections upon which Northern Pulp relied and based on which it made material investments in the Mill.

III. EVENTS LEADING TO PASSAGE OF THE *BOAT HARBOUR ACT*

In June 2014, the pipeline from the Mill to the BH-ETF suffered an effluent leak that led to a blockade of the access road to the effluent pipeline by PLFN. The Province entered into an Agreement in Principle with PLFN dated June 16, 2014 (the "**2014 PLFN Agreement**") agreeing

to introduce legislation establishing a deadline for the closure of the BH-ETF to end such blockade.

Northern Pulp commenced discussions of the renewal of its industrial approval (the "**Renewal IA**") for the operation of the Mill with representatives of NSE on November 13, 2014. Northern Pulp expressed concerns that conditions in the proposed draft IA were in breach of obligations of the Province under the Agreements and so onerous and oppressive that they could not possibly be met, and thus constituted a threat to continued operation of the Mill and the Petitioners. Notwithstanding Northern Pulp's objections to certain terms of the Renewal IA, the Renewal IA was issued on March 9, 2015. In light of the oppressive terms of the Renewal IA that threatened the viability of the Mill and the Petitioners, on April 9, 2015, Northern Pulp initiated an appeal against the issuance of the Renewal IA to the Minister, NSE pursuant to Section 137 of the Environment Act (the "**Section 137 Appeal**"). An April 15, 2015 community newsletter from Chief Andrea Paul (the "**April 2015 Newsletter**") summarized the extensive consultation and negotiations between the Province and PLFN regarding the BHA, and discussions with PLFN in connection with the Renewal IA confirming the clear understanding of the parties at such time that the Province as owner of the BH-ETF was responsible for paying for the Replacement ETF:

"Closure Date Negotiations

In August, 2014 Chief and Council set up a committee to meet with the Province to negotiate a date for the end of the treatment facility in Boat Harbour. The committee was made up of Elder Don Francis, Councillor Derek Francis, Community Members Michelle Francis Denny and Sheila Francis and Dan MacDonald. Lawyer Brian Hebert and engineer John Bachynski assisted the committee.

The Province made it clear from the start that the deadline for closing the treatment facility had to be far enough away so that a new treatment facility could be built before the deadline to replace the existing facility.

Much of the committee's work was focused on understanding the steps involved in building a new treatment facility and how long that would take.

...

Based on the technical information available, the committee recommended four years as a reasonable length of time to plan and build a new treatment facility and a new pipeline. Chief and Council proposed January 31, 2019 to the Province as the Boat Harbour closure date to be put into law.

However, the Province would not agree to this date because it didn't leave enough time for Northern Pulp to upgrade the mill. The mill is almost 50 years old; it needs major work to keep it going for the long term. The Province wanted to be certain that the mill was upgraded before the Province spent the money on a new treatment facility. The cost of building the new treatment facility will be over \$100 million and the Province is required to pay for most of that because of agreements it reached with the mill owners in the mid-1990's. The Province did not want to waste good money on an old mill.

[Emphasis added.]

Northern Pulp was not involved in any negotiations or consultations between the Province and PLFN held pursuant to the 2014 PLFN Agreement or to discuss the draft Renewal IA. The above underlined portions of the April 2015 Newsletter indicate the Province's understanding of its obligations and intended to pay the cost of the Replacement ETF. The Province provided Northern Pulp with advance notice of a bill to introduce the BHA only one day before it was introduced for first reading on April 17, 2015.

The BHA was proclaimed in force on or about May 11, 2015.

IV. EFFECT OF SECTION 4 OF THE BOAT HARBOUR ACT

Northern Pulp recognizes that it is generally constitutionally permissible for government to legislate out of its contractual undertakings, as the Province did in 2015 with the BHA. However, in doing so, it is also a universal principle that government will be required to pay damages for the breach. A party to a contract which is breached by government as the result of legislation is entitled to compensation, unless the right to be compensated for the breach is also very clearly taken away by legislation. Government may only legislate out of its compensation requirements for those breaches by using specific and unambiguous language that it is doing so.

Section 4 of the BHA used clear and specific language that the Province intended to no longer be bound by its contractual obligations under the Lease, but was not specific and explicit enough to permit the Province to be relieved of its common law obligation to compensate Northern Pulp for its breach of the Lease or other contractual obligations as a result of the Act or otherwise.

In addition, Section 4 of the BHA did not extend so far as to preclude the pursuit of legal remedies against the Province for the cessation of the use of the BH-ETF for the reception and treatment of effluent from the Mill other than as a result of the Act, including for example, by reason of certain

provisions of the Renewal IA that breached the MOU and Lease or actions of government officials to harm the Plaintiffs.

Further, Section 4 did not preclude the pursuit of legal remedies against the Province unrelated to the cessation of the use of the BH-ETF for the reception and treatment of effluent from the Mill, including actions based on provisions of the MOU, Lease or Water Supply Agreement which are unrelated to the continued use of the BH-ETF and have been breached by certain clauses the Renewal IA, subsequent orders of the Minister of Environment or actions of government officials intended to harm the Plaintiffs. The Section 137 Appeal included alleged breaches of the Agreements, but the Province chose to only limit remedies for breach of the Lease in Section 4 of the BHA.

Finally, Section 4 did not contemplate that Northern Pulp would not be entitled to rely on the Indemnity Agreement in connection with the PLFN Litigation (as defined below). The protection provided by this indemnity (as discussed herein) was a fundamental condition for owners of the Mill (including Northern Pulp) to agree to lease the BH-ETF from the Province or assume the obligations under such lease.

V. SETTLEMENT DISCUSSIONS (2016 TO 2018)

Northern Pulp experienced significant challenges in resolving the issues raised in the Section 137 Appeal of the Renewal IA, completing the environmental assessment process for the Replacement ETF, delays in Settlement Discussions as a result of court decisions imposing additional consultation requirements on the Province, and lost time resulting from an illegal blockade led by a local fisherman's group in October and November 2018.

From February 2016 until November 2018, the Province cooperated and collaborated with Northern Pulp to pursue the Replacement ETF and engaged in Settlement Discussions with Northern Pulp to resolve disputes related to the early closure of the Mill. During this period, the Province indicated through its actions and statements that it was neither the intent nor the effect of Section 4 of the BHA to remove any rights of Northern Pulp to compensation.

The Province entered into various contribution agreements with Northern Pulp during this period pursuant to which the Province agreed to contribute money in connection with the Replacement ETF, provided that such contributions could be set off against future damages awards. The Province entered into a contribution agreement (the "**2016 Contribution Agreement**") with Northern

Pulp on December 28, 2016 to reimburse 50% of Northern Pulp's expenses relating to an engineering and design study for a replacement for the BH-ETF of up to \$300,000 of out of pocket costs paid to arm's length third parties incurred after December 1, 2016. Northern Pulp commenced detailed discussions with the Province in September, 2017 regarding the timing and amount of payments to be made by the Province to Northern Pulp and the release of claims by Northern Pulp in connection with the reduction in the term of the Lease from December 31, 2030 to January 31, 2020 as a result of the BHA. The Province entered into a further contribution agreement with Northern Pulp on December 13, 2017 (the "**2017 Contribution Agreement**"), pursuant to which the Province agreed to reimburse Northern Pulp up to a maximum of \$8 million of out of pocket costs paid to arm's length third parties for professional services related to a detailed design and engineering study for a facility to replace the BH-ETF incurred after December 13, 2017 and prior to March 31, 2018.

On April 6, 2018, PLFN initiated proceedings before the Supreme Court of Nova Scotia against the Province, alleging that the Province had not properly consulted with PLFN in relation to decisions to provide funding to Northern Pulp to assist in the construction of the Replacement ETF (the "**2018 Funding Proceeding**").

An August 23, 2018 CBC article reported the following statements made by Premier McNeil in response to questions regarding the 2017 Contribution Agreement:

"As I've told all of you many times, there is a liability for the taxpayer when it comes to that mill," he said.

This week alone the government issued news releases for projects worth considerably less than the Northern Pulp payment: one for \$37,500 in the Annapolis Valley and another \$36,500 in the Cape Breton region.

McNeil was at a loss to explain why a \$6-million expenditure did not warrant similar treatment.

"I don't know why it wouldn't have been put out in a press release," he said.

No choice but to pay up

The premier also could not say how much more money would be spent on a replacement plant for the current Boat Harbour wastewater treatment facility, which is due to close by Jan. 31, 2020.

The government has said taxpayers will need to help pay for the new facility because the province is in a lease agreement with Northern Pulp. Under the Boat Harbour Act, the existing treatment plant must be closed 10 years before the lease ends.

"I didn't sign that deal," he said. "It was signed by a former government."

The current treatment facility, which handles effluent discharged from Northern Pulp, is located next to the Pictou Landing First Nation.

Province has responsibility

McNeil said he "made the decision that we would not continue to pollute Boat Harbour and force Pictou Landing to be next to that facility."

"And by doing so, it meant that there's legal obligations that we as a province will be part of and we'll meet those obligations," he added.

The premier said taxpayers would not be saddled with the entire cost of the new facility, adding the government is in negotiations.

"We do have a responsibility but I also think we have a responsibility to the First Nation's community as well, and that's the one we're meeting," he said.

Northern Pulp communicated to the Province in October 2018 that it was not possible to complete the Replacement ETF prior to the January 31, 2020 deadline in the BHA as a result of the delays described above, and commenced discussions regarding the potential issue of an extension of the deadline in the BHA with the Province.

Premier Stephen McNeil responded to a question in the Nova Scotia Legislature on October 5, 2018 from the then Leader of the Official Opposition, Hon. Karla MacFarlane as to whether the Premier has come up with any type of contingency plan and worked with Northern Pulp to ensure that they continue operation in the event that the Strait pipe is not operational by January 31, 2020 as follows (the "**Premier Remarks**"):

"Mr. Speaker, Northern Pulp will make a decision about the viability of that mill. They'll continue to go through the process. We know we have an obligation. We're closing Boat Harbour 10 years earlier. There's a liability on our side. We'll continue to move that forward, but she should go to the board of directors of Northern Pulp and ask one of them when they're going to put it in."
[Emphasis added.]

The Nova Scotia Supreme Court ruled on November 30, 2018 in favour of PLFN in the 2018 Funding Proceeding. The Court directed in its decision (the "**2018 Funding Decision**") that the Province was obligated to consult with PLFN with respect to the decision to provide funding to Northern Pulp to assist in the construction of the Replacement ETF. Settlement Discussions ceased following the 2018 Funding Decision.

VI. ATTEMPTS TO REENGAGE IN SETTLEMENT DISCUSSIONS AFTER 2018

The Petitioners have made continuous and repeated good faith requests to the Province to re-engage in Settlement Discussions following the 2018 Funding Decision. However, as outlined below, the Petitioners have, to date, been unsuccessful in re-engaging the Province in Settlement Discussions. Notwithstanding the absence of Settlement Discussions, the Province continued to acknowledge its liability to Northern Pulp for the early closure of the Mill and willingness to engage in Settlement Discussions if conditions precedent were satisfied.

A March 24, 2021 AllNovaScotia article reported the following statements made by Premier Rankin in response to questions regarding the Province's liability to Northern Pulp:

Rankin said he didn't know how much is owed, but the company and the province are going 'back and forth' over a number of expenses.

"I don't have specifics about the numbers, but obviously we are talking about tens of millions of dollars," the premier said.

"We will ensure we are protecting public money as best we can, while at the same time dealing with the liability of the Boat Harbour Act."

On April 20, 2021, counsel to the Province made the following submissions in the CCAA Proceedings, outlining certain conditions precedent to the Province engaging in the Settlement Discussions (the "**Province's April Submissions**"):

[...] while the Province is not opposed to such resolution, such a process cannot begin until the Petitioners have registered a proper project description and have been able to successfully re-engage with PLFN as a necessary prelude to providing the Province with a proper opportunity to fulfil its duty to consult with PLFN in relation to any such resolution. Further, such steps towards resolution also require that the Petitioners have advanced the EA Process to a credible stage. The six month extension of the stay will allow the Petitioners the opportunity to demonstrate that they have advanced

the EA Process. Without such steps, there can be no meaningful settlement discussions between the Province and the Petitioners.

Consequently, the Petitioners continued to engage in the environmental assessment process ("**EA Process**") and to work towards satisfying the conditions precedent to permit the re-start of Settlement Discussions. On April 29, 2021, Brian Baarda, an advisor to PEC, sent Duff Montgomerie, Deputy Minister, Department of Labour and Advanced Education with the Province a letter (the "**April 29 Letter**") requesting a meeting with the Province to discuss, among other things:

- A. the Petitioners' efforts to engage NSE in advancing the EA Process;
- B. the conditions precedent to re-engaging in Settlement Discussions outlined in the Province's April Submissions; and
- C. the consequences of delays in re-engaging in the Settlement Discussions, including increased losses to the Petitioners that are indemnified by the Province and corresponding increases to the Claims.

On May 5, 2021, Mr. Montgomerie sent a response to the April 29 Letter (the "**May 5 Response**") stating, among other things:

Thank you for your recent correspondence requesting a meeting with the Province to discuss the timing of settlement negotiations. As we stated in our recent submissions, while the Province is not opposed to a resolution, such a process cannot begin until Northern Pulp has registered a proper project description, advanced the environmental assessment to a credible stage and has been able to successfully re-engage with PLFN.

Based on a review of the Gantt Chart attached to Bruce Chapman's Ninth Affidavit, Northern Pulp will be filing its final project description with the Department of Environment on May 13th and anticipates knowing whether the project will proceed as a Class 1 Environmental Assessment by June 24, 2021. This should give Northern Pulp sufficient time to re-engage with PLFN.

[...]

At this stage, the Province does not know what the project description is for the project for which Northern Pulp is applying for an environmental assessment approval. Until this is known, the Province cannot evaluate whether it is necessary to discharge its duty to consult with the First Nations in connection with its potential

decisions regarding the project and, if so, what the content of that duty to consult entails.

We can revisit your request for a meeting at the end of June. In the meantime, we look forward to receiving a copy of your final project description.

On May 28, 2021, Jean-Francois Guillot, Vice President, Operations – East at PEC sent Mr. Montgomerie a letter responding to the May 5 Response (the "**May 28 Letter**") and requesting an urgent meeting to discuss a settlement of the Claims while the Mill remained closed and to mitigate the continued costs while continuing to pursue the EA Process for the proposed Mill transformation project (the "**Project**"). In addition, the May 28 Letter provided a detailed update on Northern Pulp's efforts to engage the Province in advancing the EA Process. It also outlined the financial factors that are key elements of the Settlement Discussions, concerns raised by the Petitioners' lenders, and the consequences of delays in initiating the Settlement Discussions. Specifically, the May 28 Letter made it clear that the ability of Northern Pulp to continue efforts to meet the timeline to complete the EA Process and obtain approvals was contingent on tangible and early progress being made in the Settlement Discussions and that it was now obvious to Northern Pulp that the initial timing for the Project and the re-start of the Mill could not be satisfied due to the Province's desire to delay the commencement of the Settlement Discussions to no earlier than the end of June 2021, as outlined in the May 5 Response.

The May 28 Letter also stated that Northern Pulp, and the Petitioners generally, have suffered losses and incurred liabilities and costs as a direct or indirect result of the construction, location or existence of the BH-ETF (the "**Indemnified Losses**") and that the Province is liable for the Indemnified Losses pursuant to an indemnity agreement with the Province, which was later assigned to Northern Pulp. In addition, the May 28 Letter stated that the Indemnified Losses, forming part of the Claims, will continue to accrue unless and until they are mitigated by a successful re-starting of the Mill. Northern Pulp specifically noted that the Indemnified Losses would exceed \$400 million.

Mr. Guillot did not receive a response to the May 28 Letter and sent a follow-up letter to Mr. Montgomerie on August 27, 2021 (the "**August 27 Letter**"). The August 27 Letter:

- A. provided a further update on the Petitioners' efforts, as required in the Province's Submissions, to: (i) advance the EA Process and the Project to a credible stage as indicated in the Province's Submissions; and (ii) engage with the PLFN;

- B. provided an update on the Indemnified Losses, noting that these amounted to \$100 million for the period up to June 30, 2021 and that they were now expected to exceed \$450 million in the aggregate;
- C. Noted concerns expressed by lenders with respect to delays in the Settlement Discussions; and
- D. requested an urgent meeting to discuss terms for seeking mediation to further the Settlement Discussions.

PLFN commenced an action (the "**PLFN Litigation**") against the Attorney General of Nova Scotia, representing, among others, the Province and Northern Pulp, pursuant to a Notice of Action and Statement of Claim dated September 9, 2010 which was amended on August 29, 2012 and February 15, 2019. Among other things, the February 15, 2019 amendment added the Attorney General of Canada, representing Her Majesty the Queen in right of Canada, as a defendant. PLFN, through its counsel, has requested that Northern Pulp or its owners pay some portion of the damages sought in the PLFN Litigation arising from the use of Boat Harbour and its adverse impacts on PLFN since 2008. By way of a letter dated August 27, 2021 (the "**PLFN Indemnity Letter**") to the Honourable Lloyd Hines, Minister, Transportation and Active Transit, Northern Pulp sought confirmation that the Province will indemnify and hold Northern Pulp harmless from and against all claims, actions and causes of action of PLFN against Northern Pulp pursuant to the PLFN Litigation.

On September 21, 2021, Peter Hackett, Deputy Minister, Public Works for the Province, provided a response to the August 27 Letter (the "**September 21 Response**"). The September 21 Response claimed, for the first time and to the surprise of Northern Pulp, that any claims arising out of the enactment of the *BHA* are a separate cause of action falling within the jurisdiction of Nova Scotia courts, that the Province would oppose any attempt to have court-ordered mediation in these CCAA Proceedings arising from the enactment of the *BHA*, and that any milestones should not contain a timeline for resolving claims arising from the enactment of the *BHA*.

The September 21 Response did not address the conditions precedent to Settlement Discussions identified in the Province's April Submissions or the substantial efforts and progress of the Petitioners in satisfying such conditions, including as set out in the April 29 Letter and the May 28 Letter. Rather, the September 21 Response, for the first time, stated that the Settlement Discussions were premature since a claim had not been filed:

[...] while the Province has advised it is not opposed to the idea of alternative dispute resolution relating to these claims, such discussions would be premature at this time. A claim has yet to be filed. Any claim filed would have to be evaluated in conjunction with the Boat Harbour Act, together with the evidence supporting each allegation before the Province would consider entering into an alternative dispute resolution process.

The September 21 Response also stated that the Province is not in a position to provide the confirmation requested in the PLFN Indemnity Letter. The Province has breached its obligations under the Indemnity Agreement by its refusal in the September 21 Letter to provide the requested indemnification. The Statement of Claim seeks damages for this breach.

On October 1, 2021, in reply to the September 21 Response, Mr. Guillot sent Mr. Hackett a letter (the "**October 1 Letter**") which:

- A. confirmed that the Petitioners intend to move the EA Process forward notwithstanding the lack of progress in re-starting the Settlement Discussions; and
- B. highlighted the inconsistencies between the Province's position in the September 21 Response and the views of the Monitor with respect to the good faith and due diligence of the Petitioners.

The October 1 Letter further stated that:

We were previously advised by Duff Montgomerie in a May 5, 2021 letter that the Province would revisit our request for a meeting to discuss re-engaging in settlement discussions at the end of June 2021. Mr. Montgomerie also advised Mr. Baarda on many occasions that the filing of any action by Northern Pulp would result in no further settlement discussions between the Province and Northern Pulp. Therefore, your request to proceed under the current limitation period which requires us to commence legal proceedings in order to preserve our legal rights is a change from our preferred approach described in Monitor's Report and in our correspondence and discussions with Mr. Montgomerie.

Also on October 1, 2021, Northern Pulp, Northern Resources, NPNS GP, NPNS GP ULC, NPNS LP, 105 BC, PEC, and Hervey Investment BV (Netherlands) ("**Hervey**" and collectively, the "**Indemnified Parties**") sent a letter (the "**Indemnity Demand Letter**") to Kim Masland, Minister, Public Works with the Province, demanding that the Province:

- A. indemnify the Indemnified Parties for the Indemnified Losses; and

- B. without prejudice to the Indemnified Losses that have been or may be incurred, pay for and on behalf of the Indemnified Parties, \$102 million of the Indemnified Losses suffered or incurred up to June 30, 2021.

On October 7, 2021, Mr. Hackett provided a response to the October 1 Letter and the Indemnity Demand Letter, which stated, among other things, that the Province is unable to respond to the request for indemnification in the Indemnity Demand Letter until the supporting evidence has been provided and considered.

As a result of the Province's failure to accept the Petitioners' repeated requests to re-enter into the Settlement Discussions, to agree to some form of mediation, or to enter into an agreement to extend the limitation periods to permit Settlement Discussions to proceed, the Petitioners were compelled to commence the Northern Pulp Litigation.

The Petitioners have been successful in obtaining the Mediation Order requiring the Province to participate in good faith mediation to resolve the claims in the PLFN Litigation. The Province should do so.

Thank you for the opportunity to present my written submissions to you today.

Your Truly,



Bruce Chapman
General Manager, Northern Pulp Nova Scotia Corporation