

Boat Harbour Remediation Project

Re IAAC Information Requirement  
Number 82

PLFN Response to NS Technical and Economic  
Feasibility Assessment of Alternative Containment Cell  
Location Site

DOCUMENT BRIEF

August 1, 2023  
Pictou Landing First Nation

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## **1.1 PLFN Traditional Territory**

1. The Mi'kmaq occupied the area around Boat Harbour and Indian Cross Point at the time of assertion of British sovereignty in 1713. A Royal Proclamation issued on May 4, 1762 by the Governor of Nova Scotia recited the claims of the Mi'kmaq to lands along the northern shore of Nova Scotia and forbade any settlements or disturbance of those lands: (Tab 1). Those lands included the area around Boat Harbour and at Indian Cross Point. The following year, the Royal Proclamation of 1763 issued by King George III forbade the governors of the colonies from granting lands reserved or claimed by the prior inhabitants unless those lands were first surrendered by those inhabitants to the Crown (Tab 2).

2. Despite these proclamations, the Colonial government of Nova Scotia issued grants of land to Scottish settlers who began to arrive in 1773 to take up settlement in the area. These grants included the lands around Boat Harbour. However, approximately 50 acres of land in the vicinity of Indian Cross Point was never the subject of a Crown grant. Early maps show this area was identified as a burial ground (Tab 112, p. 5, Figure 3, 4 and 4a).

3. The Mi'kmaq in the area of Boat Harbour refused to leave their land and stayed in the area despite the land grants to the settlers, who considered them squatters. After almost 100 years of pleading for land, in 1864 fifty acres of land next to Boat Harbour was finally purchased by the Province of Nova Scotia and reserved for the use and benefit of the Mi'kmaq in the area. The land became known as Fisher's Grant or IR24. Other lands were added to IR24 over the years and lands were also set aside as IR24G and IR37.

4. PLFN's peaceful enjoyment of its reserve lands would not last long. In 1967, the Province, through the Nova Scotia Water Authority, built a pipeline to bring wastewater from a new pulp mill at Abercrombie Point to Boat Harbour. The impact on PLFN would be devastating.

## **1.2 Discrimination and Deceit**

5. Boat Harbour had been chosen to receive pulp mill wastewater because "only a small band of Indians" would be affected. To make matters worse, representatives of the Province knowingly and intentionally made false representations about the expected conditions at Boat Harbour to gain PLFN approval for the use of Boat Harbour as a receiving water and settling basin for the mill wastewater.

6. Mr. A. F. Wigglesworth, a representative of the Nova Scotia Water Authority, met with members of PLFN at a public meeting held on IR24 on August 25, 1965. The meeting was chaired by a representative of Indian Affairs (Canada) (Tab 3) and (Tab 4).

7. Mr. Wigglesworth told those present at the meeting that Boat Harbour would be dammed, and the water levels maintained at the high-water mark creating a beautiful freshwater lake suitable for boating and waterskiing and that a skid way would be installed to accommodate boats going in and out of Boat Harbour. He said that no saltwater fish would survive but he believed that the water may be suitable for freshwater fish. He also represented that there would be no odor from the treatment facility except in the Spring when the ice broke up (Tab 8 ).

8. It was pointed out to Mr. Wigglesworth at the meeting that other Mi'kmaq from across Nova Scotia would travel to Boat Harbour to relax and enjoy a day of fishing. It was further pointed out by Chief Louis Francis that he felt that there was an historical treaty which gave the Mi'kmaq the exclusive right to fish in Boat Harbour. Some non-Mi'kmaq residents of the area were present at the meeting and confirmed that non-Mi'kmaq residents in the area had respected the use of Boat Harbour by the Mi'kmaq over the years.

9. At the meeting, PLFN members expressed concern about the adverse impacts of the proposed project, and all members present were against it. In particular PLFN was upset about: (a) the loss of clams, quahogs, eels, smelt, lobster and trout; (b) the loss of feeding grounds for ducks and geese; (c) the loss of a safe anchorage for their boats; (d) the loss of the use of the water for swimming and recreational sport; (e) odors blowing off the water onto residential areas of the reserve less than a quarter of a mile away; (f) loss of future building lots along the Boat Harbour shoreline; and (g) lack of consideration for the feelings of members over the ruination of land which they considered their own.

10. After hearing these objections and realizing that PLFN would not consent, the Province began to consider a cash payment to PLFN if they could be "bought off" that way (Tab 5).

11. Shortly afterward, Mr. Wigglesworth took Chief Francis and Councillor Martin Sapier to Renforth, New Brunswick to meet Dr. Bates who showed them a domestic sewage disposal system on the weekend of October 10, 1965. Dr. Bates told them that the system, which had not yet gone into operation, was similar to the industrial wastewater facility proposed for Boat Harbour. The Chief and the Councillor were impressed that the Renforth system had no odor (Tab 7). They signed a handwritten agreement in principle on Sunday, October 10, 1965 in Saint John, New Brunswick expressing their consent to the project, motivated in part by the belief that the new pulp mill would be good for the entire area of Pictou County (Tab 6).

### **1.3 The Agreement**

12. The Province's plan worked. PLFN Chief and Council agreed to a deal brokered by Canada. PLFN would give up the right to maintain Boat Harbour in its natural state, together with its other riparian rights, in exchange for \$60,000 dollars. This would be accomplished by an agreement to transfer of the administration of riparian rights associated with IR24 from the federal Crown to the provincial Crown.

13. However, the *Indian Act* provided that no interest in reserve lands could be alienated without either a formal surrender or a transfer in lieu of expropriation in accordance with s. 35 of the *Indian Act*. There had been no surrender and the formalities of s. 35 of the *Indian Act* had not been followed. As a result, one Justice Canada lawyer at the time expressed doubt about the validity of the transfer (Tab 10).

### **1.4 Order-in-Council 1966-1669**

14. Nevertheless O-I-C 1966-1669 was issued on September 2, 1966, purporting to transfer the riparian rights in Boat Harbour to the provincial Crown (Tab 9). There were several conditions attached to O-I-C 1966-1669 embodying the agreement with PLFN, including: (a)

that the Province take remedial action should the water in Boat Harbour become septic, (b) that the Province build a slipway to allow boats to go in and out of Boat Harbour, and (c) that the Province pay \$60,000 to PLFN as compensation (Tab 9).

## 1.5 Legal Obligations Ignored

15. Compensation was paid. However, the Province did not build the promised slipway to allow boats to go in and out of Boat Harbour and, even though Boat Harbour became septic, the Province failed to remediate it as agreed.

16. The rapid decline of water conditions in Boat Harbour were documented in submissions by local citizens to an engineering consulting firm hired several years later to study the problem (Tab 9), (Tab 12), and (Tab 14).

17. A 1970 Health Canada investigation revealed that Boat Harbour had lost all of its original characteristics and was merely a retention pond and that oxygen demand caused by the wastewater exceeded the available oxygen in the system (Tab 15). Also, in 1970 the Department of Fisheries and Forestry (Canada) reported that results of investigations conducted since 1967 showed a progressive concentration of pollutants in Boat Harbour (Tab 15).

18. While the Province took some measures to alleviate the conditions in Boat Harbour in the 1970's, septic conditions remained. Odors from Boat Harbour adversely impacted the use and enjoyment of IR24 and surrounding lands (Tab 16), (Tab 17), and (Tab 18).

## 1.6 Adverse Health Effects from Odors

19. The odors from the pulp wastewater were caused by sulphur compounds and mercaptans (Tab 223). In addition to rendering conditions intolerable, as early as 1970 a local physician, Dr. MacDonald, raised concerns about the health effects of the sulphur gasses on residents in the area. Dr. MacDonald's concerns were validated by later studies which showed that people living near pulp mills and exposed to airborne sulphur compounds have a higher incidence of adverse health effects. These studies are reviewed in The Science of Odor as a Potential Health Issue by Susan S. Schiffman and C. M. Williams, *J. Environ. Qual.*, Vol. 34, January 2005 (Tab 145) with the primary health effect being an increase in respiratory ailments. See also Jaakkola JJK, Vilkkka V, Marttila O, Jäppinen P, Haahtela T., *The South Karelia Air Pollution Study: The effects of malodorous sulfur compounds from pulp mills on respiratory and other symptoms. Am Rev Resp Dis.* 1990;142:1344–1350 (Tab 20) and Marttila O, Jaakkola JJ, Partti-Pellinen K, Vilkkka V, Haahtela T. *South Karelia Air Pollution Study: daily symptom intensity in relation to exposure levels of malodorous sulfur compounds from pulp mills. Environ Res.* 1995 Nov;71(2):122-127 (Tab 97).

## 1.7 Flooding Reserve Land

20. The Province did not maintain water levels in Boat Harbour at the ordinary high-water mark, as it had represented to PLFN, but instead exceeded those levels by 9 feet thereby flooding IR24 and IR24G without authority (Tab 29). Water levels were eventually lowered in 1997 and 1998 but not below the ordinary high-water mark (Tab 111)

## **1.8 1970 Wastewater Agreement**

21. The Province and Scott Maritimes entered into an agreement dated September 30, 1970, pursuant to which the Province agreed to provide freshwater for mill operations and accept wastewater from the mill at the Boat Harbour treatment facility. The initial term was just over 25 years, ending on December 31, 1995. It was renewable for a further period of 25 years at the option of either party (the “**1970 Wastewater Agreement**”) (Tab 13).

## **1.9 Lawsuit Against Canada**

22. On May 12, 1986, PLFN filed a lawsuit against Canada for breach of fiduciary duty in respect of the Boat Harbour treatment facility (Tab 19).

23. By September 1990 Canada had reviewed the historical record and conducted discovery examinations of relevant witnesses, including a witness from the Nova Scotia Water Authority. Canada had concluded that PLFN had a valid claim against Canada and had advised PLFN that it would not contest liability for its breach of fiduciary duty and instead would enter settlement negotiations. (Tab 24).

## **1.10 Canada Approaches the Province**

24. Canada had also concluded that PLFN had been coerced by representatives of the Nova Scotia Water Authority in 1965 and misled about the anticipated impact of the proposed use of Boat Harbour as a wastewater treatment facility (Tab 24, at p.2). Canada approached the Province informally in September 1990 to discuss a resolution to the problems at Boat Harbour (Tab 23).

## **1.11 Fish Kill**

25. On October 9 and 10, 1990, thousands of fish were found dead in the Boat Harbour estuary just below the dam at the mouth of Boat Harbour. The cause was oxygen depletion due to the presence of wastewater from the Boat Harbour treatment facility (Tab 22), and (Tab 31) (Tab 21, 23, 32).

## **1.12 Province Commits to Closure of Boat Harbour treatment facility**

26. On October 17, 1990, Canada sent a formal cease and desist letter to the Province demanding the Province stop flooding reserve lands (Tab 23). This led to a series of meetings on October 19 and 25 and November 8, 1990 between representatives of Canada, PLFN and the Province (Tab 25), (Tab 25), and (Tab 26)

27. The meetings led to a verbal commitment from the Province in November 1990 to close the Boat Harbour treatment facility in five years and remediate affected lands (Tab 30).

28. Canada, the Province and Scott Maritimes commissioned an engineering study on options for the treatment of Scott’s pulp wastewater and the Province announced the initiative in a press release on January 15, 1991 (Tab 27).

### **1.13 New Pulp and Paper Effluent Regulations**

29. The press release referred to new federal pulp and paper effluent regulations. These were regulations made under the *Fisheries Act* which were expected to come into force by 1992 and would require existing mills to comply with more stringent environmental standards by 1994 (Tab 39, p. 1-1).

### **1.14 Canada-PLFN Negotiating Framework**

30. Negotiations between Canada and PLFN led to Canada providing PLFN with a negotiating framework on January 29, 1991. Canada saw the best solution as the closure of the treatment facility and the clean up of Boat Harbour and reserve lands. It committed to using its best efforts vis-à-vis the Province and Scott Maritimes to that end. Canada also committed to studying the health impacts of the treatment facility and negotiating compensation and relocating the community if needed (Tab 28).

### **1.15 Province Confirms Commitment to Close Treatment Facility and Remediate Boat Harbour**

31. On January 29, 1991, Canada threatened legal action against the Province for trespass, apparently dissatisfied with the pace of negotiations with the Province to that point (Tab 30).

32. In response, on February 12, 1991, the provincial environment minister, John Leefe, wrote to the federal minister of Indian affairs, Thomas Siddon, confirming the verbal commitment made in November 1990 to close the Boat Harbour treatment facility within 5 years, clean up the area and return Boat Harbour to its original state (Tab 30). Leefe suggested that any legal action by Canada could jeopardize the Province's efforts.

### **1.16 New Treatment Facility and *Fisheries Act* Compliance**

33. Closure of the Boat Harbour treatment facility was also being advanced as part of the Province's plan to comply with the federal *Fisheries Act*, including with the anticipated new *PPER*. On March 21, 1991, the federal fisheries and environment ministers sent a joint letter to the Province requesting details of the Province's plans to relocate the treatment facility and clean up the area. The federal ministers intended to incorporate the Province's plans for a new treatment facility into an order under s. 37(2) of the *Fisheries Act* requiring that the plans be implemented (Tab 31).

### **1.17 Tri-Partite Negotiations**

34. On May 3, 1991, Siddon advised Leefe that Canada would work with the Province towards a tripartite agreement to put into effect the Provincial commitment to close the treatment facility and remediate Boat Harbour (Tab 33).

35. On July 2, 1991, Norma Scott, on behalf of PLFN, wrote to the Province's legal counsel setting out the terms under which PLFN would forbear from taking legal action against the Province for losses incurred to date. These included a firm deadline of the closure of the Boat Harbour treatment facility, an interim fee for the continued use of Boat Harbour for treating

wastewater until such time as the new treatment facility could be built and the transfer of Crown lands to PLFN (Tab 34).

36. PLFN had concerns that the Province had changed its mind on closing the Boat Harbour treatment facility when no progress had been made on signing a tripartite agreement. However, Minister Leefe assured representatives of PLFN at a meeting on July 11, 1991 that the Province had not changed its position, but some government officials were reluctant to have the Province sign an agreement because of potential clean up costs and the precedent transferring Crown lands might have (Tab 35).

37. On August 12, 1991, Joel Matheson, Nova Scotia's Attorney General, wrote to PLFN's legal counsel outlining the Province's intention to close the Boat Harbour treatment facility, remediate the area and transfer lands to PLFN. It also discussed interim measures such as building a rock barrier to prevent fish kills in the Boat Harbour estuary and insulating blowers at the treatment facility as a noise reduction measure (Tab 36).

38. According to the Attorney General, the Province had just received a copy of the HA Simons report on options for treatment of Scott's pulp wastewater (Tab 36). The report was not officially released until October 1991, and recommended a new activated sludge treatment facility be built adjacent the mill at Abercrombie Point at a cost of \$74 million (Tab 39).

39. The Attorney General advised PLFN that the Province's commitments to PLFN were dependent on reaching agreement with Canada and Scott Maritimes on sharing the costs of the new treatment facility and the cleanup of Boat Harbour (Tab 36). If no agreement was reached on cost sharing the Province would make another proposal to PLFN.

40. On August 26, 1991, PLFN advised the Province that in exchange for the transfer of four parcels of Crown land adjacent to IR24, it would forbear from legal action for a reasonable period of time to allow the Province to negotiate a cost sharing arrangement with Canada and Scott Maritimes (Tab 37). The land was needed for housing.

41. On September 16, 1991, the Province agreed to transfer the land as requested as a sign of the Province's good faith in carrying out its stated intentions. The value of the land was to be credited toward any amount for which the Province was ultimately found liable (Tab 38).

### **1.18 Fisheries Act Compliance**

42. On October 11, 1991, the Province reported to the federal fisheries minister on its progress on measures to ensure compliance with the *Fisheries Act*. The Province advised that the HA Simons report had identified a preferred option for a new treatment facility and set out a timeline for approval and construction. The timeline was subject to reaching agreement with Canada and Scott Maritimes on cost sharing. The Province also advised that a provincial-federal committee had been set up to study the sediment in Boat Harbour preliminary to developing a remediation plan. Finally, on September 21, 1991 a rock berm had, with PLFN's consent, been built at the mouth of Boat Harbour to prevent fish from entering the estuary where the early fish kills had occurred (Tab 40).

### **1.19 Sound Abatement Measures**

43. On December 16, 1991, the Province reported that in the summer it had installed silencers on all blowers in the blower building at Boat Harbour which reduced, but did not eliminate, the noise coming from the blower building (Tab 41).

### **1.20 Tripartite Negotiations at Standstill**

44. On April 1, 1992, the premier of Nova Scotia, Donald Cameron, wrote to the federal fisheries minister updating him on discussions for a new treatment facility. The premier advised that the province would pay 1/3 of the projected \$100 million price tag provided Canada and Scott Maritimes paid the rest (Tab 32).

45. On April 3, 1992, the Province reported to PLFN that talks with Canada and Scott Maritimes on cost sharing of a new treatment facility and the clean up of Boat Harbour were still ongoing (Tab 42).

46. PLFN proposed a task force approach to speed up the process (Tab 43). However, Nova Scotia rejected this initiative (Tab 44).

47. Ultimately, Canada was unable to contribute directly to a new treatment facility because public support for the pulp and paper industry would run afoul of the North American Free Trade Agreement (“NAFTA”) (Tab 52).

### **1.21 Analysis of Sediments in Stabilization Lagoon**

48. By April 1, 1992, the Province had decided to arrange a study to see what chemicals were in the sediment in Boat Harbour and how much sediment was there (Tab 32). Jacques Whitford Environment Limited and Beak Consultants Limited were retained by the NS Department of Supply and Services to conduct the study. The final report would not be delivered until November 5, 1992 (Tab 48).

### **1.22 Notice of Intended Action**

49. On July 2, 1992, PLFN served Nova Scotia with a notice of intended action pursuant to the *Proceedings Against the Crown Act* (Tab 46), and (Tab 45).

### **1.23 Canada’s Proposal**

50. On July 27, 1992, Canada presented a settlement proposal to PLFN. Canada would pay \$20 million in compensation and an additional \$15 million to be held in trust as a relocation fund should PLFN need to relocate because of the adverse impacts from Boat Harbour. In exchange PLFN would release Canada from any liability in connection with the Boat Harbour treatment facility (Tab 47).

51. At the same time, Canada would continue to work with Nova Scotia and Scott Maritimes to solve the environmental problems at Boat Harbour. To that end, PLFN would assign any causes of action it had or may in the future have against Nova Scotia and Scott Maritimes

connected with the Boat Harbour treatment facility and cooperate with Canada in any action Canada might bring under the assignments (Tab 47).

52. Separation of settlement of the lawsuit against Canada from the environmental solutions at Boat Harbour became known as the “two circle” approach. “Circle one” entailed resolving the litigation between Canada and PLFN. “Circle two” involved Canada doing what it could to address the environmental condition at Boat Harbour (Tab 53), (Tab 55), and (Tab 67).

#### **1.24 Circle Two – Environmental Solutions for Boat Harbour**

53. In July 1992 Canada engaged Dr. Peter Meyboom to facilitate the development of a comprehensive strategy to address the environmental problems at Boat Harbour, identify policy and financial implications, discuss alternative solutions with all parties involved, and advise the Department of Indian Affairs accordingly (Tab 54).

54. On November 10, 1992, Dr. Meyboom organized the first of several scientific seminars for representatives from all parties involved at which, *inter alia*, the Province presented the results of the Boat Harbour sediment report and Canada presented the results of groundwater monitoring (Tab 50).

55. A multi-party engineering group was set up to examine solutions to the environmental problems at Boat Harbour (Tab 55).

#### **1.25 Transitional Authorization - PPER**

56. The new *PPER* had come into effect and required all pulp mills to comply with their stricter requirements by December 1, 1992. However, the *PPER* provided for transitional authorizations allowing non-compliant pulp mills to continue operating up to December 31, 1995 with approval of the federal ministers of environment and fisheries (Tab 49).

57. On November 30, 1992, the Province received transitional authorization to operate the treatment facility until December 31, 1993 (Tab 62).

#### **1.26 Settlement with Canada**

58. On December 8, 1992, Canada and PLFN reached agreement on the principles of a settlement of PLFN’s lawsuit against Canada, consistent with Canada’s offer of July 27, 1992 (Tab 51).

59. A final settlement agreement between PLFN and Canada was executed with an effective date of July 20, 1993 (Tab 56).

60. Subsection 2.2.1 of the settlement agreement explicitly provided that settlement funds were not being paid for the taking of an interest in land pursuant to s. 35 of the *Indian Act*. No surrender of Reserve lands or any interest therein was contemplated by the settlement agreement.

61. PLFN’s consent to the continued discharge of wastewater into Boat Harbour was not a condition or a requirement of the settlement agreement.

62. PLFN was required to release Canada from all liability in respect of the Boat Harbour treatment facility (section 12.1). The agreement also required PLFN to assign its rights of action against the Province and Scott Maritimes to Canada (section 12.3).

63. Canada agreed to keep PLFN informed of its ongoing negotiations and discussions with the Province and Scott Maritimes with respect to the resolution of the outstanding issues relating to Boat Harbour with full disclosure and the utmost good faith (subsection 12.3.2).

64. Any proceeds recovered in an action against Nova Scotia or Scott Maritimes would belong to Canada unless they exceeded the compensation paid by Canada under the settlement agreement (subsection 12.3.4).

65. PLFN agreed to assist Canada in any action taken by Canada against the Province or Scott Maritimes, and Canada had sole discretion whether to take any such action or not (subsection 12.3.3).

66. Subsection 8.1.1 set out Canada's position that it was not apparent that Boat Harbour could be returned to its former state. Subsection 8.1.2 provided that Canada would nonetheless explore ways that might yield a solution to the environmental problem at Boat Harbour.

### **1.27 Circle Two – Phase II Report 1993**

67. In announcing the settlement agreement with PLFN on July 21, 1993, Canada also announced that it was actively participating in a separate negotiating process with PLFN, the Province, Scott Maritimes and other stakeholders, aimed at a rehabilitation strategy for Boat Harbour. In a backgrounder released with the announcement, Canada advised that it had hired Dr. Meyboom to facilitate a collaborative process to bring about a solution to the environmental problems at Boat Harbour and that options had been identified (Tab 57).

68. On August 10, 1993, Jacques Whitford and Beak Consulting finalized their study on remediation alternatives for Boat Harbour: *Boat Harbour Treatment Facility Remediation Alternatives Phase II – Final Report* (the “**Phase II Report**”) (Tab 59).

69. The Phase II Report describes the original configuration of Boat Harbour and the changes made in 1971 to create the current configuration (see p. 16-17).

70. In the current configuration, raw wastewater was discharged from the pipeline that led from the mill into an open ditch at what became known as Point A and flowed to one of two settling basins which were used alternately (see diagram Tab 58, see Tab 59, p. 21). The wastewater spent up to 17 hours in a settling basin during which time some solids would settle out of the wastewater to the bottom of the settling basin, necessitating regular removal (Tab 59 , p. 21).

71. Wastewater then left the settling basins at what became known as Point B, and flowed by gravity through an open ditch to the aerated stabilization basin (“ASB”) which was formed in 1971 by dyking a small section of the eastern end Boat Harbour (Tab 59, p. 17, Tab 58). Wastewater was retained in the ASB for 5 to 6 days where bacteria oxidized dissolved organic

matter. Nutrients and oxygen had to be added to the wastewater for the bacteria to work. Nutrients were added in an ad hoc fashion (Tab 59, p. 23). Oxygen was added by means of surface mechanical aerators in the ASB, which acted like large eggbeaters churning the water at the surface and mixing it with air, and submerged sparger-type aerators that pumped air into the wastewater at the bottom of the ASB (Tab 58, p. 21).

72. Wastewater then flowed from the ASB through a diffuser outfall at what became known as Point C and into the main body of Boat Harbour which was, since Boat Harbour was first dammed in 1967, referred to as the stabilization lagoon. The stabilization lagoon acted as a settling pond (or finishing pond) allowing more matter to settle out of the wastewater (Tab 59, p. 17, Table 4.3).

73. Wastewater left the stabilization lagoon through a control structure at the causeway for Highway 348 near the mouth of Boat Harbour, at what became known as point D (Tab 59, p. 27). The control structure and causeway were built in 1967 to create the originally configured stabilization lagoon. At Point D the wastewater flowed into a tidal estuary where it mixed with sea water. The movement of the wastewater and seawater mixture was dependent on the tide and, as noted above, resulted from time to time in fish dying from lack of oxygen (Tab 59, p. 11). By 1993 the Province had built the temporary rock berm, referred to above, at the entrance to the estuary to prevent fish from entering.

74. Jacques Whitford and Beak Consulting concluded that the ASB had been poorly managed and with some modest improvements and professional operation the wastewater would meet all of the requirements of the newly introduced *PPER* before it left the ASB at Point C (Tab 59), p. 17). As a result, the stabilization lagoon would no longer be needed and in fact was undesirable because of the anerobic conditions that it created (Tab 59, p. 20).

75. This meant that it might be possible to remove the causeway and dam at Point D and the rock berm at the outlet of the estuary and allow the stabilization lagoon to become tidal once again (Tab 59, p. 17).

76. Based on this, the Phase II Report identified three options for the rehabilitation of Boat Harbour: Option 1 - keep the treatment facility at Boat Harbour in its current configuration; Option 2 - abandon and restore part of the existing facility and allow the other parts to operate at their current site; and, Option 3 - abandon and restore the entire facility at Boat Harbour and construct a new facility elsewhere (Tab 59, p. 2-3).

77. The Phase II Report determined that Option 1 would not meet the requirements of the *PPER* without building a pipeline from the causeway at Boat Harbour (Point D) overland to the shore at MacKenzie Head and then 2 kilometers into the Northumberland Strait (Tab 59, p. 60, para. 7.1.1, 61 at para. 7.2). This option would require a pumping station near Point D (Tab 59, p. 63, para. 7.2.6). Option 1 would not allow restoration of the stabilization lagoon or other parts of the treatment facility. Reserve lands would remain flooded (Tab 59, p. ii-iii).

78. Option 2 involved removing the rock berm at the entrance to the estuary, removing the causeway and dam and allowing the stabilization lagoon to once again become tidal. This could be done by either allowing the wastewater to continue to flow from the ASB at Point C directly into the stabilization basin (Option 2a) or constructing a pipeline overland from Point C to

MacKenzie Head and the 2 kilometers into the Northumberland Strait to carry wastewater directly from the ASB to the Northumberland Strait (Option 2b) (Tab 59, p. iv and v, p. 64-73).

79. Option 3 involved creating a new treatment facility either at the mill site at Abercrombie Point or at Boat Harbour with a pipeline taking the wastewater 2 kilometers off MacKenzie Head (Tab 59, p. 73-74). These were similar to the options outlined in the 1991 HA Simons report (Tab 59, p. 73).

80. Under Options 1 and 2, odors would still be a problem since the main source of odors were the settling basins and the ASB (Tab 59, p. 66). The report did recommended measures to reduce the odors if Option 1 or Option 2 were selected. These included replacing open ditches with a pipeline between the end of the pipeline leading from the mill (Point A) to the settling basins, and from the settling basins (Point B) to the ASB (Tab 59, p. 63, para. 7.2.6).

### **1.28 PLFN's Response to Phase II Report**

81. On September 21, 1993, PLFN advised the Province that it would not support any option that did not involve a new treatment system near the mill and would insist that Canada hold the Province to the commitments made in the February 12, 1991, which were to close the treatment facility, remove all structures and restore Boat Harbour to its natural state (Tab 60), (Tab 30).

### **1.29 Canada's Response to Phase II Report**

82. On October 8, 1993, Canada advised the Province that under the terms of the settlement agreement reached with PLFN, Canada had undertaken to explore ways to solve the environmental problems at Boat Harbour and had taken an assignment of all PLFN's legal rights with respect to Boat Harbour. Accordingly, Canada's objective and concern was to eliminate adverse impacts on PLFN – trespass due to flooding, foam, colour of water, odors, noise and health risks. Canada noted that Option 3 would address all the concerns but could have their own impacts. Subject to consulting with PLFN Canada felt Option 2b would address most of the concern provided that the Province explore removing sediments that would be exposed when the water was lowered to stop the flooding because they contained dioxins and furans (Tab 61).

### **1.30 The Province's Response to Phase II Report**

83. On October 15, 1993, the Province submitted an application under the new *Pulp and Paper Effluent Regulations* ("*PPER*") to Environment Canada for an extension of its transitional authority to December 31, 1995. In its application, the Province advised that it was proceeding with Option 2b and expected that Option 2b would be implemented and the treatment facility compliant with the *PPER* by December 31, 1995. However, the remediation of the treatment facility "downstream" of Point C would take longer as it required more study and consultation (Tab 62).

84. On November 12, 1993, PLFN advised Canada that it wanted all components of treatment facility located away from Boat Harbour (Tab 63), (Tab 64). This conflicted with Canada's position that Option 2b might be acceptable. PLFN suggested a modified Option 2b that involved replacing the settlement basins and the ASB at Boat Harbour with a clarifier and aeration basin somewhere else along the pipeline route.

85. On December 13, 1993, Canada wrote to the Province advising that Option 2b did not protect the interests of PLFN and asked the Province to address the long-term use of Boat Harbour and to consider Option 2c (Tab 65b). Canada took a similar position on the Province's application to extend the transitional authorization under the *PPER* (Tab 65a).

86. On December 16, 1993, Canada confirmed the PLFN-Canada strategy for Circle Two remediation would be to abandon consideration of Option 2c in favour of seeking commitments from the Province on the future use of Boat Harbour (Tab 66).

87. On December 20, 1993, the Province advised Canada that it could not make any long-term commitments without agreement of Scott Maritimes, that Option 2b had been decided upon after substantial consultation with all interested parties and that the Province still hoped to meet the December 31, 1993 deadline under the *PPER*. (Tab 68).

### **1.31 PPER Transitional Authorization Extension Granted**

88. The federal ministers granted a transitional authorization extension ("TAE") to the Province on December 31, 1993, allowing the Province to operate the treatment facility until December 31, 1995, even though it did not comply with the *PPER*. In the letter accompanying the TAE, Canada set a deadline of December 31, 2004 for the Province to submit detailed plans for the pipeline from Point C to Mackenzie Head, clean the inactive settling basin and clean the ASB, and a deadline of December 31, 1995 to resolve the ownership issue between the Province and Scott Maritimes (Tab 69).

89. The "ownership issue" was discussed in the Phase II Report and referred to fact that the pulp wastewater would need to meet higher standards if it was operated by the Province than if it was operated by Scott Maritimes (Tab 59, p. 14-15).

90. Finally, the letter advised of strong opposition from fishing organizations to the discharge of the wastewater into the Northumberland Strait (Tab 69).

### **1.32 Remediation Planning Continues**

91. Planning by the Province for the remediation of the stabilization lagoon continued with engagement of multiple stakeholders, including PLFN, through a committee referred to as the "Boat Harbour Remediation Committee" or the "Remediation Planning Committee" (Tab 70). The focus of the committee was on returning the stabilization lagoon to a tidal state once Option 2b changes to the treatment facility were made and the pipeline to MacKenzie Head was constructed. The guiding principles were agreed upon by the committee at its meeting on August 11, 1994 and were based on PLFN's goals which were the cessation of wastewater discharge into the lagoon, removal of all manmade structures and clean up (Tab 71), and (Tab 73).

92. By September 15, 1994, the committee was discussing options for clean up of the stabilization basin based on recommendations from Jacques Whitford (Tab 74).

### **1.33 Pipeline to Mackenzie Head**

93. The Option 2b called for a pipeline into the Northumberland Strait via MacKenzie Head. The Province applied for environmental approval of the pipeline project under the federal Environmental Assessment Review Procedures (EARP) (Tab 72), (Tab 75).

### **1.34 Sludge Disposal Cell**

94. The Phase II Report had recommended the removal of sludge that had accumulated in the settling basins and the ASB as solids in the wastewater settled out during the wastewater treatment process. In preparation for the removal of the sludge, the Province decided to place the sludge in a waste disposal cell that it planned to build on provincial Crown land at Boat Harbour between IR37 and IR24G (Tab 73), (Tab 74).

95. While PLFN was aware that the Province proposed to build a sludge disposal cell, neither Canada nor PLFN had consented to it and had not been consulted in any meaningful way. When the Province began to clear trees beside Boat Harbour for the disposal cell, PLFN and Canada became aware of the scope of the project. The Nova Scotia Department of Environment had issued a permit for the disposal cell without a provincial environmental review. No federal environmental review was triggered. PLFN was concerned about the impact on the use of IR37 and IR24G with a waste disposal cell nearby (Tab 76).

### **1.35 Potential Sale of Mill and PLFN Questions**

96. PLFN had learned that Scott Maritimes was considering a sale of the mill and there was uncertainty about how that might impact the cleanup of Boat Harbour. PLFN raised several questions relating to the Province's intentions at a meeting on November 10, 1994 which were provided to the Province in writing (Tab 77).

97. The Province provided a written answer to those questions on November 29, 1994 (Tab 78). The answers were concerning to PLFN (Tab 79). The earliest date for completion of the pipeline to MacKenzie Head was now 1997. The sludge disposal cell was intended to remain in place (Tab 78).

### **1.36 New Recovery Boiler Needed**

98. PLFN had also learned that the mill required a new recovery boiler that could cost \$115 million. This had implications for the continued use of Boat Harbour. If Scott Maritimes did not invest in a new recovery boiler the mill would shut down, and Boat Harbour could be entirely closed and remediated. In that event, spending \$17 million on a pipeline to MacKenzie Head would be a waste of money (Tab 80).

99. On the other hand, if Scott Maritimes did invest in a new recovery boiler, the mill would continue operating for some time raising the possibility that the settling basins and ASB at Boat Harbour could be used for decades to come (Tab 780).

### **1.37 PLFN Proposal**

100. At the prospect of a large toxic waste disposal site at Boat Harbour and the possibility of the Boat Harbour treatment facility continuing indefinitely, PLFN became dispirited. On

December 14, 1994, PLFN outlined to Canada a proposal it intended to make to the Province.

101. PLFN would ask the Province to provide 300 acres of land for a new reserve and to build housing and infrastructure so as to give those members of PLFN who wanted to do so, the opportunity to relocate to the proposed new reserve.

102. Those who wanted to stay on PLFN's traditional lands would have to put up with the adverse impacts from the settling basins and ASB at Boat Harbour indefinitely and wait until December 31, 2005 to have the causeway removed so that the stabilization lagoon could return to tidal, ending the ongoing trespass to reserve lands and allowing the stabilization lagoon to be remediated at that time (Tab 80).

### **1.38 Negotiations to Close Entire Treatment Facility in Ten Years**

103. PLFN made the Province at meeting held on January 6, 1995 with representatives of Canada present (Tab 81).

104. For its part, Canada agreed to consider any new proposals but did not want to backtrack from the current commitments in light of its obligation under section 8 of the 1993 Settlement Agreement to explore ways to solve the environmental problem at Boat Harbour (Tab 81).

105. PLFN's proposal allowed the Province to enter into negotiations with Scott Maritimes for the continued use of the Boat Harbour treatment facility for ten more years despite the fact that Scott Maritimes had notified the Province on February 24, 1995 that it was renewing the 1975 Wastewater Agreement (Tab 95, p. 2).

106. At the same time PLFN and the Province agreed to negotiate their own agreement which would allow PLFN to consent to the Province-Scott Maritimes deal. Once an agreement was reached, PLFN would take it to Canada for its consent. By May 29, 2005, Provincial Cabinet and the Premier had authorized negotiations with Scott Maritimes and PLFN (Tab 82).

107. By July 1995, the components of the ten-year deal were taking shape. No longer was PLFN seeking to relocate to a new reserve. Instead, all components of the Boat Harbour treatment facility would be removed in 10 years.

108. The Province assured PLFN that it had a legal duty to clean up Boat Harbour and while it would seek financial contribution from Canada it would not attempt to evade its responsibility to do so. Boat Harbour would be returned to its natural state. The settling basins and disposal cell would be rehabilitated, the sludge press structure removed, and the ASB opened so no manmade structures would remain (Tab 83), (Tab 84).

109. On August 31, 1995, Canada advised PLFN that it had learned of a deal between the Province, PLFN and Scott Maritimes, and reminded PLFN that Canada must consent (Tab 85).

110. On September 27, 1995, PLFN confirmed by letter to the Province the terms of the deal. The treatment facility would be absolutely shut down by December 31, 2005, Boat Harbour remediated with no manmade structures, and lands agreed upon around Boat Harbour turned over to PLFN, some immediately and the rest after the remediation. In exchange, PLFN would

not take any legal action against the operator of the treatment facility, nor request Canada to do so, during the ten-year term (Tab 86).

111. On October 12, 1995, PLFN advised Canada of the deal and asked Canada to undertake not to take any legal action against the mill operator for a period of ten years, as contemplated in the letter of September 27, 1995 outlining the deal (Tab 87).

112. Meetings between Canada, PLFN and the Province followed, with the Province confirming the deal and outlining its response to Canada's various concerns in a letter dated October 27, 1995 (Tab 88).

113. The Province confirmed a delicately balanced agreement had been reached between PLFN, the Province and Scott Maritimes whereby the company would either lease or own the Boat Harbour treatment facility and operate it for a period of ten years after which the use of the Boat Harbour treatment facility would cease completely. In doing so Scott Maritimes was giving up its right to the continued use of the Boat Harbour treatment facility for a 25 year renewal term under the 1975 Wastewater Agreement (Tab 88, at p. 6).

114. The Province unconditionally agreed to clean up Boat Harbour after the 10-year period. Specifics of the remediation were to be determined later.

115. Land around Boat Harbour, with some exceptions, would be transferred to PLFN. All that was required was for Canada to agree not to take any legal action during the ten-year period (Tab 88).

116. Canada refused to give its consent (Tab 89), (Tab 90), (Tab 91), (Tab 92), (Tab 83), (Tab 94), and (Tab 97). Instead, it proposed tripartite negotiations between Canada, PLFN and the Province for a formal agreement (Tab 97).

### **1.39 1995 MOU between Province and Scott Maritimes**

117. Despite this, the Province had already entered into a memorandum of understanding with Scott Maritimes dated December 1, 1995 (the "1995 MOU") setting out the terms under which Scott Maritimes would give up its right to renew the 1975 Wastewater Agreement for a further 25 years (Tab 95).

118. Scott Maritimes would lease the pipeline, the settling basins and the ASB for a 10-year period ending December 31, 2005, and take over operation of the treatment facility during the term of the lease (Tab 95, section 4.01(b), (c)(ii), (g)).

119. Before the lease took effect, the Province would clean out the settling ponds and the ASB and undertake other work listed in Schedule 3 (Tab 95, section 4.01(d) and Schedule 3).

120. While the stabilization lagoon was not to be included in the lease, Scott Maritimes could use it for as long as required by government regulators. It was expected that the regulated point (the point at which wastewater was tested for compliance with *PPER*) would be moved from Point D (below the stabilization lagoon) to Point C (below the ASB at the start of the stabilization lagoon). The Province was required to pay the costs of any changes required to

allow Point C to become the regulated discharge point (Tab 95, section 4.01(e)).

121. The Province agreed to lower the water level in the stabilization basin to ordinary high water mark as soon as possible to avoid any alleged trespass (Tab 95, section 4.01(h)).

122. The Province would be responsible for the remediation of the stabilization lagoon (Tab 95, section 4.01(g)).

123. At the end of the lease, Scott Maritimes would restore the settling ponds and ASB to the same condition they were in when the lease began (Tab 95, section 4.01(f)).

124. The Province would be responsible for remediation after that (Tab 95, section 4.01(g)).

125. The Province would be responsible for acquiring all permits for the operation of the treatment facility and, as regulator, agreed not to impose any standards more stringent than those under the *PPER* (Tab 95, section 4.01(k)).

126. Scott Maritimes would be entitled to use the sludge disposal cell until the end of the lease although it would not form any part of the leased premises (Tab 95, section 4.01(n) and (o)).

127. The Province would indemnify Scott Maritimes for any liability arising from the operation of the treatment facility prior to the start of the lease or any continuing claims in nuisance or trespass including “subrogated claims” of Canada under the 1993 Settlement Agreement (Tab 95, section 4.01(c)(i), Schedule 5).

128. Formal agreements were required to give effect to the 1995 MOU. Accordingly, a lease (the “Lease”) (Tab 98, Tab 104), a licence for the use of the stabilization lagoon (the “Licence”) (Tab 99) and an indemnity agreement (the “Indemnity Agreement”) (Tab 100) were all executed and dated December 31, 1995.

#### **1.40 Boat Harbour Negotiation Committee**

129. The Province agreed to enter into negotiations with PLFN and Canada to see if a formal agreement could be reached (Tab 101).

130. Soon regular meetings of representatives of Canada, the Province and PLFN took place under the name “Boat Harbour Negotiations Committee” with formal minutes being introduced by September 1996 (Tab 102), (Tab 103), (Tab 105), and (Tab 107).

131. At the same time, it was agreed that PLFN and the Province would discuss the lands around Boat Harbour to be transferred from the Province to PLFN (Tab 102, at p. 4).

#### **1.41 Provincial Order-in-Council 96-621**

132. By Provincial Order-in-Council 96-621 dated August 14, 1996 the Province approved the agreements entered into with Scott Maritimes (which by then had become Kimberly-Clark through a reorganization) and the transfer of lands around Boat Harbour to PLFN as and when

the Minister of Transportation and Public Works determined they were no longer needed for the operation or clean up of the Boat Harbour treatment facility (Tab 106).

#### **1.42 Boat Harbour Negotiations Committee Continues to Meet (1996-1997)**

133. During the remainder of 1996 and into 1997, the Boat Harbour Negotiations Committee continued to meet and PLFN and the Province continued to discuss the lands which would be transferred to PLFN around Boat Harbour. The understanding between the Province and PLFN was again set out in an exchange of correspondence on October 1 and October 6, 1997 between counsel, and was summarized by the Province's counsel (Tab 109), (Tab 110):

I hereby confirm that the lease for the operation of these effluent treatment facilities between the Province and Kimberly-Clark ceases absolutely on December 31, 2005 and there is no provision for, or intention by the parties to use the facility for effluent treatment after that date. To use your words "there will be an absolute shut-down". Should replacement facilities be constructed and in use before that date, the closure of the Boat Harbour facility may take place sooner than December 31, 2005. However, I have no reason to suspect an earlier closing date.

134. The bulk of the lands around Boat Harbour would be transferred immediately and others after remediation. But all these lands would be transferred to PLFN and it would be up to PLFN to have the lands transferred to Canada for addition to PLFN reserves, if PLFN chose to do so (Tab 110).

135. New control structures had been built at the causeway which allowed the Province to begin lowering the water levels in the stabilization basin in early October 1997, as required under the 1995 MOU with Scott Maritimes (Tab 107), (Tab 113), (Tab 95, at s. 4.01(d) and Schedule 3).

136. The original purpose of the committee, to negotiate a tripartite agreement, seems to have been abandoned, and Canada and PLFN instead relied on the Province's commitment to close the treatment facility by end of 2005. This was consistent with the Province entering into a 10-year lease for the treatment facility with Kimberly-Clark, the Province's ongoing efforts to plan for the remediation of the treatment facility, and its willingness to transfer some lands around Boat Harbour to PLFN even before the remediation of Boat Harbour was completed.

#### **1.43 Fisheries Act Compliance**

137. On September 21, 1998, DFO and Environment Canada notified the Province had finally met the requirements of the s.37 *Fisheries Act* compliance letter of March 21, 2001, which related to the fish kills in the Boat Harbour estuary in October 1990 (Tab 114), (Tab 31). The letter advised that the wastewater discharge met the requirements of *PPER*.

138. At the same time, Environment Canada advised Kimberly-Clark that it was satisfied with the lease arrangements between the company and the Province and with the plan to build a new treatment facility in a location other than Boat Harbour (Tab 116).

139. The “ownership issue” under the *PPER* had apparently been solved by means of the lease of the treatment facility to Kimberly-Clark.

#### **1.44 Boat Harbour Negotiations Committee Continues to Meet (1998-1999)**

140. The Boat Harbour Negotiations Committee continued to meet regularly.

141. At the September 10, 1998 meeting, the Province reported on the lowering of water levels in the stabilization lagoon. The ordinary high-water mark had earlier been determined to be .68 meters (Tab 108). The water had been lowered steadily from October 1997 to August 1998 from 1.7 meters to 1.095 meters and was not expected to go any lower as long as Point D remained the regulated discharge point for the treatment facility meaning that some trespass would continue (Tab 113).

142. By October 22, 1998, the Province and PLFN had identified land around Boat Harbour that was to be transferred to PLFN immediately. Other land would be transferred after the remediation of Boat Harbour (Tab 115, first handwritten attachment).

143. A timeframe for remediation after closure of the treatment facility on December 31, 2005 was being developed, with PLFN lands to be remediated within one year of closure (Tab 115, second handwritten attachment).

144. The “temporary berm” that had been placed at the mouth of the Boat Harbour estuary in 1991 was later replaced by a control structure at the mouth of the estuary in 1996, one of three structures built at the time. The estuary control structure had been left open for several months and oxygen levels in the estuary had remained compliant with *PPER* (Tab 115).

145. At the Boat Harbour Negotiations Committee meeting on February 18, 1999, the Province reported that deeds to some of the lands around Boat Harbour had been signed by the Minister of Transportation and Public Works and that the Province considered that these were being transferred in consideration of PLFN allowing trespass to reserve lands by flooding (Tab 117).

146. The temporary control structure which had replaced the temporary rock berm at the mouth of the Boat Harbour estuary was removed between September and December, 1999 (Tab 118), and (Tab 119).

#### **1.45 2000 Agra Simons Report on Cost of Relocating Wastewater Facility**

147. Kimberly-Clark attended a meeting of the Boat Harbour Negotiations Committee on January 12, 2000, and reported that it was looking at various options to treat wastewater after December 31, 2005. Its consultants had identified Pictou Harbour as the best outfall for a new pipeline to carry wastewater from a new treatment facility (Tab 119).

148. At the same meeting, the Province confirmed that in 1995 it had negotiated a 10-year continuation of the treatment facility with PLFN on the basis that the treatment facility would be closed and cleaned up and the bulk of the lands around Boat Harbour transferred to PLFN (Tab 119).

149. It was decided that Kimberly-Clark would be asked to join the committee (Tab 119).

150. In February 2000, Agra Simons finalized a report for Kimberly-Clark on treatment options after 2005 (Tab 120). The report considered various options, including the continued use of the ASB at the Boat Harbour treatment facility (Tab 120, at p. 6, 35). The options for treatment of wastewater in a new activated sludge treatment facility at the mill site were similar to those identified by HA Simons in 1991 (Tab 120), and (Tab 39). The cost of the option requiring a pipeline to Lighthouse Beach was estimated at \$61 million (Tab 120, p. 47, Table 6.2).

#### **1.46 Province Acknowledges 1995 Agreement with PLFN**

151. At the Boat Harbour Negotiations Committee meeting of July 14, 2000, the Province acknowledged that PLFN had agreed to the lease of the treatment facility to Kimerly Clark to December 31, 2005 “in exchange for a guaranteed permanent closure in ten years, and a transfer of the bulk of the lands around Boat Harbour” (Tab 121). As no formal agreement had been put in place, this acknowledgement could only have related to the exchange of letters between counsel in September and October 1995 referred to above.

152. At the same meeting, the last of the deeds for the land around Boat Harbour promised in 1995 was delivered to PLFN personally by the Minister of Transportation and Public Works (Tab 121).

#### **1.47 Judicial Recognition of Aboriginal Title in Pictou County**

153. On March 8, 2001, the Chief Judge of the Nova Scotia Provincial Court released his decision in *R. v. Marshall*, 2001 NSPC 2, 2001 CarswellNS 105, *infra*. In it he “concluded that the Mi’kmaq of the 18<sup>th</sup> century on mainland Nova Scotia probably had aboriginal title to lands around their local communities” (see para. 143).

#### **1.48 Bypass Pipeline Proposal and 2001 MOU**

154. Despite the earlier agreement to close the treatment facility after December 31, 2005 when the lease expired, discussions between PLFN, Kimberly-Clark and the Province took place to see if there was a way for at least part of the Boat Harbour treatment facility to continue in operation after 2005, while discontinuing the use of the larger stabilization basin so that it could be remediated and open to the tidal influences of the Northumberland Strait. The talks led to a memorandum of understanding dated September 27, 2001 between the Council of PLFN and Kimberly-Clark (the “2001 MOU”) (Tab 123).

155. Under the 2001 MOU, Kimberly-Clark undertook to build, by December 31, 2005, a short pipeline from Point C to the Boat Harbour estuary just below Point D, bypassing the stabilization basin altogether (the “Bypass Pipeline”). In addition to building the Bypass Pipeline (Article 6), Kimberly-Clark agreed to transfer 4,000 acres of land to PLFN (Article 4), reimburse PLFN for \$950,000 in past expenses incurred in dealing with Boat Harbour (section 10.1), and make annual payments to offset the anticipated costs of PLFN’s continued engagement with the Boat Harbour treatment facility (section 10.3).

156. Payment of the \$950,000 was to be made once Kimberly-Clark had the appropriate approvals from the Province to operate the treatment facility as contemplated in the 2001 MOU (section 10.1). Kimberly-Clark's obligations were subject to securing the necessary government approvals (Article 13).

157. For its part PLFN undertook to refrain from taking any action to stop the continued use of the settling basins and the ASB at Boat Harbour until December 31, 2030, so long as Kimberly-Clark complied with the terms of the 2001 MOU (Article 3).

158. Apart from the 2001 MOU, the Province undertook to restore the stabilization basin to a tidal estuary once the Bypass Pipeline was in place, and to remediate the rest of Boat Harbour once the use of the settling basin and ASB was discontinued (Tab 123, section 6.4).

159. To accomplish the return of the stabilization basin to a tidal estuary, the Province undertook to remove the causeway and control structures and replace them with a bridge so that boats could enter Boat Harbour as they had before (Tab 126, p. 4).

#### **1.49 2002 Community Referendum on 2021 MOU**

160. The 2001 MOU required ratification by the members of PLFN. A community referendum was scheduled for July 17, 2002.

161. A summative information package was prepared and provided to PLFN members (Tab 126).

162. A community information meeting was held on June 19, 2002, as required by the referendum rules. The role of provincial and federal government officials was limited at the information meeting. They had been invited, and then uninvited, but were welcome to attend (Tab 125).

163. The wording of the referendum question had been crafted by PLFN and Kimberly-Clark (Tab 132).

164. The question was whether the member approved of the 2001 MOU "the major points of which are: a pipeline will be installed through Boat Harbour; Boat Harbour will become tidal; the pipeline will discharge ONLY on the outgoing tides, ... the Band will receive \$7,870,000.00 in payment from Kimberly-Clark over the 25 year term of this agreement, including a \$950,000.00 payment at the beginning of this Agreement; ..." (Tab 126).

165. The question recited the amount of the total payments to be received from Kimberly-Clark but mistakenly referred to a 25-year period. The payments were to start immediately and continue for 28 years to 2030. The major points did not mention the offsetting expenses anticipated by PLFN over the course of that same period as a result of PLFN's continued involvement and oversight of the continued operation of the Boat Harbour treatment facility (Tab 123). Actual costs to date had been \$950,000 over a 5-year period.

166. The question passed by a slim 7-vote majority.

## **1.50 Problems with the Bypass Pipeline Proposal**

167. There were two problems with the Bypass Pipeline proposal. The first was that most of the odors associated with the treatment facility emanated from the open ditch leading from the existing pipeline to the settling basins, the settling basins themselves, the open ditch leading from the settlement basins to the ASB, and the ASB itself (Tab 59, pp. 46, 47, 66). Odor was increased in areas where there was turbulent mixing such as in the ASB (Tab 59, p. 67). All of these parts of the treatment facility would continue to operate as before.

168. While odor was clearly a concern to PLFN in discussions leading up to the 2001 MOU (Tab 122, Tab 124), the 2001 MOU did not address odor reduction measures (Tab 126).

169. After the referendum, PLFN and Kimberly-Clark agreed to work on an odour reduction program (Tab 129). However, little was done other than to install air monitors (Tab 131). The recommendations for odour reduction in the 1993 Phase II Report were to close all open ditches to avoid vapours from escaping (Tab 59, p. 68). This simple measure had not been taken in the eight years since that report and, as it turns out, was never implemented at any time before or after the 2001 MOU was concluded.

170. The second problem with the Bypass Pipeline proposal was that its feasibility was in doubt. It was known since at least the 1993 Phase II Report that some quantity of wastewater would be drawn back into Boat Harbour with the incoming tide (Tab 59, p. 39-40, 64). The authors of the Phase II Report had not investigated the impacts of this on water quality within a tidal Boat Harbour and called for further studies (Tab 59, p. 64). No one had done the further studies required to understand the anticipated impact of tidal action on the water quality in Boat Harbour before presenting the Bypass Pipeline proposal to PLFN members for approval.

171. Nonetheless, Kimberly-Clark provided limited information from a water modelling study conducted by ENSR International for inclusion in the information package provided to PLFN members (Tab 124). However, the modelling was based on outdated data and ENSR later did a more detailed study in 2004 (Tab 137).

172. The implications of tidal flushing would soon lead to abandonment of the Bypass Pipeline proposal.

## **1.51 Lease Extension**

173. Despite the uncertain feasibility of the Bypass Pipeline proposal and the fact that the existing Lease did not expire until December 31, 2005, shortly after the 2001 MOU was approved at the PLFN community referendum, the Province entered into an unconditional lease extension agreement with Kimberly-Clark dated October 22, 2002, extending the term of the existing Lease for 25 years after December 31, 2005 (Tab 127). The lease extension did not provide for early termination of the Lease should the Bypass Pipeline prove unfeasible.

## **1.52 Surrender of Licence**

174. On October 22, 2002, Kimberly-Clark and the Province also executed a surrender of licence agreement whereby Kimberly-Clark agreed to terminate the Licence to discharge effluent into the stabilization basin when Kimberly-Clark “completes the installation and final commissioning of” the Bypass Pipeline (Tab 128).

### **1.53 Boat Harbour Committee**

175. The Boat Harbour Negotiations Committee continued to meet but had been rebranded as the Boat Harbour Committee (Tab 131).

### **1.54 Combined Project - Bypass Pipeline and Return to Tidal Project**

176. In June 2003, after consulting with the Canadian Environmental Assessment Agency, the Province and Kimberly-Clark agreed that the Bypass Pipeline project and the opening of Boat Harbour to tidal influence were both aspects of one integrated project (Tab 144).

177. Accordingly on June 17, 2003 the Province and Kimberly-Clark prepared a joint project description for a “Re-Introduction of Tidal Influence to Boat Harbour” project which included the construction of the Bypass Pipeline, removal of the causeway and control structures, and construction of a bridge so that the stabilization basin could become tidal. The project description was filed with the Canadian Environmental Protection Agency (“CEA”) to initiate an environmental assessment (“EA”) under the *Canadian Environmental Assessment Act* (“*CEAA*”) (Tab 144, Tab 141).

178. The Province agreed to be the proponent of the project for purposes of the EA, but operational responsibility for carrying out the project was divided between the Province and Kimberly-Clark. Kimberly-Clark was responsible for the changes to the outfall at the ASB, the pipeline, and the diffuser at the end of the Bypass Pipeline and the Province was responsible for the removal of the causeway and the construction of the new bridge (Tab 144, Tab 141).

179. Most of the construction work for the project, including the Bypass Pipeline, was to take place in 2006 (Tab 141).

180. However, the 2001 MOU called for completion of the pipeline before December 31, 2005 and PLFN understood that remediation would take a year after pipeline completion. The timeline in the project description caught PLFN by surprise and was concerning (Tab 131). This led to the Province reassuring PLFN on September 16, 2003 that it was fully committed to making Boat Harbour tidal and boat accessible no later than December 31, 2006 (Tab 133).

181. However, PLFN was reluctant to accept any lands or funds under the 2001 MOU until Kimberly-Clark had approval for the Bypass Pipeline in hand.

182. In November 2003, the parties agreed that neither the lands to be transferred under the 2001 MOU nor reimbursement of the \$950,000 would occur until PLFN and Kimberly-Clark were certain that the project would be approved. However, the annual payments would commence right away as PLFN continued to incur costs and costs were now greater than anticipated (Tab 134, 135).

183. The parties also discussed what might happen if the project did not receive environmental approval. They agreed to disagree on the legal implications of that eventuality for the 2001 MOU (Tab 135).

### **1.55 Fishery Concerns over Release of Sediments from Boat Harbour**

184. In December 2003, the Province submitted a scoping document to federal regulators. Concerns were raised by DFO and fishers operating in the Northumberland Strait that the release of the toxic sediments from the stabilization basin could harm the fishery (Tab 144, Tab 144).

185. As a result, instead of relying exclusively on tidal flushing to remove and disperse the sediments, the Province decided to remove most of the sediments by mechanical dredging before opening Boat Harbour to tidal to reduce the amount of sediment swept into the Northumberland Strait with tidal flushing (Tab 144, Tab 137).

186. Accordingly, the Province prepared a sediment management plan to be carried out outside the ambit of the existing project undergoing the EA by CEA (Tab 144, Tab 137). The first step of the plan was to conduct further work to characterize the sediments in Boat Harbour, which was done during the winter of 2004 (Tab 144, Tab 137).

### **1.56 Better Dispersion Modelling Needed**

187. On April 27, 2004, Jacques Whitford, the outside environmental consulting firm retained by the Province to coordinate the EA process, reported that due to concerns expressed by local fishers DFO required updated and more focused dispersion modelling showing the movement of sediments and wastewater once Boat Harbour was opened to tidal influences. As a result, ENSR, was retained to do the work. The modelling was expected to be completed the end of June 2004 (Tab 137).

188. ENSR was the same company that had prepared the water flow modelling for Kimberly-Clark to present to PLFN for the 2002 referendum. This suggests that the information used by ENSR in its modelling in 2002 was not current and the modelling was not sufficiently focused to give an accurate prediction of wastewater flows once Boat Harbour was opened to tidal.

### **1.57 Project on Time**

189. In its April 27, 2004 report for the Boat Harbour Committee, Jacques Whitford advised Environmental approval was expected in October 2004 (Tab 137).

190. The minutes of the Boat Harbour committee from June and July 2004 show that the new dispersion modelling was underway (Tab 138, Tab 139).

191. A pilot project to remove some sediments from the stabilization basin was carried out successfully in early August 2004. Kimberly-Clark hired engineers to design the Bypass Pipeline in September 2004 and expected construction to begin in March 2005 (Tab 140).

192. On October 15, 2004, the EA report prepared by Jacques Whitford was submitted to Environment Canada for comment (Tab 141, Tab 144). The accompanying letter explained that

Kimberly-Clark had decided to move the construction of the Bypass Pipeline to 2005 (Tab 141).

193. At the October 27, 2004 meeting of the Boat Harbour Committee Kimberly-Clark advised that the Bypass Pipeline was expected to be complete by April, 2005 (Tab 142).

### **1.58 Odors Still an Issue on Reserve**

194. Chief Anne Francis-Muise reported at the same meeting of the Boat Harbour Committee that odors and fog were still an issue on reserve (Tab 142).

### **1.59 Duty to Consult and Accommodate Affirmed by SCC**

195. On November 18, 2004, the Supreme Court of Canada rendered its decision in *Haida Nation v. British Columbia*, 2004 SCC 73, in which it first articulated that the Crown had a duty to consult with Indigenous peoples before making any decision or taking any action that might, to the knowledge of the Crown (actual or implied) adversely impact Aboriginal and treaty rights protected by section 35 of the *Constitution Act, 1982*. The duty went beyond merely advising Indigenous peoples of potentially impactful government decisions, but required the Crown to alter its direction or otherwise make accommodations if needed. This duty applied even to Aboriginal and treaty rights that had not yet been recognized by government or determined by a court.

### **1.60 Kimberly-Clark now Neenah Paper**

196. On November 30, 2004, Kimberly-Clark completed a corporate reorganization in which a subsidiary, Neenah Paper Inc. (“Neenah Paper”), took ownership of Kimberly-Clark’s Canadian pulp and paper operations, and was then spun off as a separate company (Tab 143). The result was that Neenah Paper was not the legal owner of the mill and the operator of the Boat Harbour treatment system. The Lease, the Licence, the Indemnity Agreement and the 2001 MOU were assigned by Kimberly-Clark to Neenah Paper (Tab 155).

### **1.61 New Bypass Pipeline Route Proposed**

197. On January 26, 2005, Neenah Paper informed the Boat Harbour Committee that it was considering an alternative route for the Bypass Pipeline. Instead of passing through the stabilization basin it would be built on land around the shore of the stabilization basin, including over reserve lands (Tab 146).

198. The new route was being proposed to allow Boat Harbour to be drained following completion of the pipeline so that mechanical dredging “in the dry” could take place. This would be more effective for removal of sediments and provide visual assurance to area fishers that the sediments were being removed (Tab 146).

199. PLFN had concerns about the impact of the pipeline on its lands around the shores of Boat Harbour. It was also concerned that the Province proposed to place the dredged sediments from the stabilization basin into the existing industrial landfill on Crown land next to IR37 (Tab 146). Recent study of sediment showed the volume of sediments was double what was originally thought (Tab 136).

## 1.62 Eutrophication - Bypass Pipeline Not Feasible

200. The updated and more detailed sediment and wastewater dispersion modelling done by ENSR had been completed and included with the draft EA report. At the April 13, 2005 Boat Harbour Committee meeting, Jacques Whitford reported that the new dispersion modelling revealed predicted eutrophic conditions in parts of Boat Harbour even after it was open to tidal (Tab 147).

201. Environment Canada explains eutrophication on its website (<https://rb.gy/dsmxi>) as follows:

Eutrophication (also known as nutrient enrichment) is a result of large amounts of nutrients being released into a nutrient deficient water body which leads to excessive amounts of aquatic plant growth. Most often, the nutrient phosphorous has the greatest effect on eutrophication because it tends to be more limited within the environment. However, some environments are nitrogen deficient and more greatly influenced by changing levels of nitrogen.

Over time, this excessive plant growth can naturally turn a lake into a bog and eventually into land. However, eutrophication can be accelerated by the release of nutrients from human activities such as from fertilizers used in agriculture and at our homes. This rapid transition is not beneficial for the fish and other organisms which live in lakes who have to cope with depleted oxygen levels because of the decomposition of plants, as well as changing biodiversity and species abundance.

202. At the meeting of April 13, 2005, Kimberly-Clark advised that it would investigate whether a reduction in the nutrients it was adding to the wastewater entering the ASB could alleviate the problem (Tab 147).

203. By May 20, 2005, Neenah Paper had determined that the eutrophication problem was so serious that it had engaged an engineering firm to consider an alternative to the Bypass Pipeline. The alternative consisted of a pipeline that would run north from the ASB to the Northumberland Strait with a discharge point near Lighthouse Beach passing over PLFN lands (Tab 148). Neenah Paper raised the need for more time to investigate alternatives (Tab 147).

204. At the Boat Harbour Committee meeting of May 24, 2005, PLFN requested a copy of the 1999 ENSR dispersion modelling report which had formed the basis of the representations made to PLFN about the feasibility of the Bypass Pipeline proposal in 2002 (Tab 149).

205. At the June 15, 2005, meeting Neenah Paper was considering having ENSR redo the modelling and look at other options (Tab 150). It was also noted that PLFN had now been provided with a copy of the 1999 ENSR report.

## 1.63 *Marshall* decision confirmed by SCC

206. On July 20, 2005, the Supreme Court of Canada in *R. v. Marshall*, 2005 SCC 43 upheld the findings of the Chief Judge of the Provincial Court regarding Aboriginal title in Nova Scotia.

#### **1.64 Odour Still an Issue on Reserve**

207. At the July 27, 2005 meeting of the Boat Harbour Committee, the Province acknowledged that the odors from the treatment facility would need to be resolved if people were going to be attracted to Lighthouse Beach next to the PLFN reserve (Tab 151).

#### **1.65 Search for Solutions to Eutrophication Problem**

208. By the October 12, 2005 meeting of the Boat Harbour Committee ENSR had confirmed that eutrophication was going to be a problem. Solutions such as oxygen delignification, reducing nutrient levels and water quantity were all being considered (Tab 152).

209. At the November 9, 2005 meeting of the Boat Harbour Committee Neenah Paper reported that a process known as oxygen delignification could solve problems with eutrophication as well as odour and wastewater colour (Tab 153). Oxygen delignification was still under consideration on December 9, 2005 (Tab 154).

#### **1.66 Boat Harbour Licence Expires**

210. On December 31, 2005, the Boat Harbour Licence to discharge wastewater into the stabilization basin expired (Tab 99).

#### **1.67 Mill Continues to Explore Oxygen Delignification**

211. In March 2006 Neenah Paper reported that the final results of the oxygen delignification study showed that it would cost twice as much as Neenah Paper had planned to spend (Tab 156).

212. Neenah Paper reported on August 30, 2006, that oxygen delignification was still being considered (Tab 158).

#### **1.68 Province Plans to Dredge Boat Harbour**

213. In the meantime, the Province was proceeding on its own to remove sediments from Boat Harbour in anticipation of the eventual opening of Boat Harbor to tidal (Tab 157).

214. By August 30, 2006, the Province had applied to the Nova Scotia department of environment for a permit to raise the height in the existing waste disposal cell to accommodate the dredged sediments from Boat Harbour. When asked whether PLFN would be part of the review process for the changes to the disposal cell, PLFN was advised that the Province has no legal obligation to consult with PLFN (Tab 158).

#### **1.69 Licence Extension**

215. On November 30, 2006, the Province extended the Licence to discharge wastewater into the stabilization lagoon to December 31, 2008 (Tab 159).

## **1.70 2001 MOU Extension Agreement**

216. In January 2007, PLFN and Neenah Paper finalized an amending agreement to amend the 2001 MOU (the “MOU Extension Agreement”). The amending agreement was dated a year earlier, January 6, 2006 (Tab 155, Tab 160).

217. Under the MOU Extension Agreement, PLFN acknowledged that Neenah Paper would need to use the stabilization basin until December 31, 2008 while it worked with the Province to find another solution that would allow the continued use of settling basins and ASB at Boat Harbour while allowing remediation and opening of the stabilization basin (Article 2).

218. For its part, Neenah Paper was to make reasonable commercial efforts to find a solution to the problem (Section 2.01). Neenah Paper also agreed to waive all conditions under the 2001 MOU and to transfer the lands and make the reimbursement payment provided for in the 2001 MOU immediately without waiting for government approval (Recitals H and I). Neenah Paper also agreed to increase the monthly expense payments to PLFN until December 31, 2008 (Article 2).

219. The MOU Extension Agreement reserved all existing rights and claims of PLFN should the conditions necessary to restore the stabilization basin to a tidal estuary not be achieved by December 31, 2008 (Section 3.02) and did not release any claims or provide PLFN’s consent to any act that might give rise to a claim (Section 4.03).

## **1.71 AMEC Study**

220. The Province and Neenah Paper took the opportunity presented by the extension to seek outside consultants to take a fresh look at the Boat Harbour problem (Tab 160).

221. The Province cautioned that there may be no alternatives available other than complete closure of the treatment facility (Tab 160).

222. The Province and Neenah Paper put out a tender for expressions of interests for the remediation of Boat Harbour and eventually AMEC was selected by October 23, 2007 (Tab 161, Tab 162, Tab 163, Tab 164, Tab 165, Tab 166).

223. AMEC proposed a simple strategy. It would determine the capacity of Boat Harbour to assimilate nutrients and then determine which options were feasible within the assimilative capacity of Boat Harbour (Tab 166).

224. By January 9, 2008, AMEC had determined a target nutrient level of 15 mg of nitrogen per 1 litre of water (15mg/l) and was working with Neenah Paper to build a model that would predict nitrogen concentrations in Boat Harbour (Tab 167).

225. On June 11, 2008, AMEC reported the preliminary results of the modelling to the Boat Harbour Committee. It confirmed that once Boat Harbour was returned to tidal the water in Boat Harbour would still exceed 15 mg/l of nitrogen in many places and eutrophication would therefore be a problem. This was true whether the wastewater was discharged from a Bypass Pipeline at Point D or directly from the ASB into the stabilization basin at Point C. It would also

not matter that the wastewater was only discharged on the outgoing tide, since the incoming tide would bring some of the wastewater back into Boat Harbour (Tab 172).

### **1.72 Odors Continue**

226. In the meantime, odors associated with Boat Harbour were still a concern on reserve lands. It was even a “big problem” for non-Mi’kmaq residents of the area according to the Province (Tab 161).

### **1.73 Disposal of Sediments from Settling Ponds and ASB**

227. The treatment facility was having problems with sediments, even though the settlement basins and ASB had been dredged in 1996. Wastewater volumes in the ASB had been cut by 50% due to the buildup of sediments at the bottom. This led to the wastewater spending only 5 days in the ASB instead of 9. The ASB was operating at 50% capacity causing more organic matter to be carried out of the ASB (Tab 201, p. 52-53).

228. As a result Neenah Paper removed sediments from the settling basins and transported them to an industrial landfill near the mill for disposal (Tab 165). It also began to remove sediments from the ASB and place them temporarily in the disposal cell at Boat Harbour (Tab 168, Tab 201, at p. 53).

### **1.74 Sale of Mill to Northern Pulp**

229. On June 28, 2008, the mill was sold by Neenah Paper to Northern Pulp (Tab 176). The deal had been announced on May 15, 2008 and it was reported that Neenah Paper would pay the buyer \$10-20 million to take the mill off its hands (Tab 170).

230. The Province had initiated discussions on May 27, 2008 with the Assembly of Nova Scotia Mi’kmaq Chiefs (the “Assembly”) through a newly formed consultation office administered by the Kwilmu'kw Maw-klusuaqn Negotiation Office (“KMK”) (Tab 171). Those discussions involved the transfer of timber leases and licences from Neenah Paper to Northern Pulp.

231. On June 10, 2008, KMK asserted a provincial duty to consult in respect of the timber leases and licences and noted its disappointment that the Province had not given adequate notice for meaningful consultation. KMK also expressed its view that consultation must include the Boat Harbour lease and license (Tab 171).

232. On June 11, 2008, PLFN asserted a provincial duty to consult on any government approval of the transfer of the Lease or Licence from Neenah Paper to Northern Pulp (Tab 173).

233. On June 20, 2008, the Province notified KMK that while it regretted that more time was not available for consultation a decision had been made, and an order-in-council approving the transfer/assignment of existing licences/agreements from Neenah Paper to Northern Pulp was expected on June 24, 2008 (Tab 175).

234. On June 24, 2008, the Province initiated consultation on the transfer of the Boat Harbour lease and licence under the new Terms of Reference for a Mi'kmaq-Nova Scotia-Canada Consultation Process which required a letter initiating consultation to be sent to all Chiefs and the KMK Consultation Office (Tab 174, Tab 177). In the letter initiating consultation, the Province did not acknowledge a duty to consult but did advise that consultation with PLFN would continue to take place through the Boat Harbour Committee before any extension of the lease or license beyond December 31, 2008 occurred (Tab 177).

235. On July 15, 2008, the KMK consultation office responded to the Province advising that PLFN Chief Francis-Muise had been appointed to handle the Boat Harbour consultation on behalf of the Assembly (Tab 178).

236. PLFN subsequently learned that the Province had entered into an acknowledgment agreement with Northern Pulp on May 12, 2008 confirming that the 1995 Indemnity Agreement would continue for the benefit of Northern Pulp (Tab 269, para. 29).

237. PLFN also learned later, that on May 15, 2008 the Province had already extended the Licence on a month to month basis provided PLFN was in agreement that the regulated discharge point could remain at Point D (Tab 169).

### **1.75 Treatment Facility Closure Only Option**

238. AMEC continued to look at options for the discharge of wastewater from the ASB in a way that would allow Boat Harbour to be remediated. This included infilling parts of Boat Harbour so that no water would pool in recessed areas. A variant of this even included pumping water from the Northumberland Strait to Point C to dilute the wastewater leaving the ASB (Tab 179). However, AMEC reported on October 8, 2008 that none of these options were feasible (Tab 179).

239. With no apparent solution to the Boat Harbour problem that would involve the continued operation of the treatment facility at Boat Harbour, on November 19, 2008 Chief Francis-Muise notified the Province that PLFN wanted the treatment facility closed as earlier promised (Tab 180).

240. In her letter, Chief Francis-Muise asserted PLFN Aboriginal title to Boat Harbour and the lands around it. She detailed the adverse impacts of the treatment facility on PLFN over the years. She recounted a recent call she had received from a mother asking if it was safe to let her son go to school given the odors coming from Boat Harbour. She insisted that the Province close the treatment facility and remediate Boat Harbour as promised.

241. Chief Francis-Muise also recognized that a further period of time would be required to find an alternative location for a new treatment facility and offered to negotiate an extension of the status quo if appropriate accommodations could be made (Tab 180).

### **1.76 December 4, 2008 Commitment Letter**

242. In response to the Chief's letter, three Cabinet ministers Scott, Morse and Baker (Minister of Justice and Aboriginal Affairs), met with Chief Francis-Muise on December 2, 2008 and

promised her that the Province would close the Boat Harbour treatment facility and remediate Boat Harbour. Two days later, this commitment was confirmed in a letter dated December 4, 2008 from Minister Scott (Tab 130).

243. The December 4, 2008 letter acknowledged the adverse impacts of the treatment facility on PLFN members and confirmed the Province's commitment to find another location to discharge the wastewater and to clean up Boat Harbour, in the following terms:

We welcomed the opportunity to confirm, in a face to face meeting, among leaders of both governments the Province's intention to end the negative impacts on your community caused by the Boat Harbour Effluent Treatment Facility.

As Minister Baker so graphically stated: "To say that the Band has been long suffering would be a masterful understatement of the obvious." It is our unwavering intention to end that suffering as quickly as possible. It should have been done a long time ago.

Our first step will be to find another discharge location that does not involve Boat Harbour. We will then clean the harbour and return it to a tidal state."

244. The letter also committed to making a contribution to PLFN to offset the continued negative impacts of the treatment facility that PLFN would endure while a replacement facility was built (Tab 130):

In grateful response to the band's cooperative spirit we wish to make a contribution to the community recognizing the negative impact of delay in closing the facility from the intended completion date of December 31,2008, to the final completion of this major task.

We have agreed that a committee consisting of the Chief of the Band and a Minister of the Province shall be created, with a first meeting in early January and to oversee the work necessary to achieve our mutual objective. You have expressed a willingness to consider what form this contribution might take before our first meeting.

### **1.77 PLFN-Provincial Negotiations off to a Slow Start**

245. The negotiations with the Province towards a closure date for the treatment facility and interim accommodations got off to a slow start. At the Boat Harbour Committee meeting of February 18, 2009, the Province reported setbacks in appointing a provincial negotiating team (Tab 181).

246. However, by March 9, 2009, the Province had appointed a single negotiator, Department of Justice lawyer, Joe Pettigrew (Tab 182).

### **1.78 Province Loans \$15 million to Northern Pulp**

247. On March 17, 2009, without consulting with PLFN, the Province loaned \$15 million to Northern Pulp (Tab 237).

### **1.79 PLFN-Northern Pulp Accommodation Agreement No. 1**

248. On March 25, 2009, PLFN advised the Province that it was discussing an accommodation agreement with Northern Pulp with a term to June 30, 2009, to allow time for provincial-PLFN negotiations to unfold. June 30, 2009 was the new target date for reaching an MOU with the Province on a way forward (Tab 183).

249. On April 7, 2009, PLFN and Northern Pulp entered into the accommodation agreement. PLFN agreed, on a without prejudice basis, to forbear from taking any action relating to the Boat Harbour treatment facility until June 30, 2009 (Tab 184).

### **1.80 Provincial Negotiations Stall**

250. On June 9, 2009, a provincial General Election brought the NDP government to power and negotiations stalled.

251. On June 30, 2009, PLFN put the Province on notice that the accommodation agreement with Northern Pulp expired that day and that no further extension would be granted without the full and informed consent of the PLFN membership, once the Province's proposal for Boat Harbour was known (Tab 185).

252. By July 29, 2009, negotiations were still on hold while the new minister (of transportation and infrastructure renewal) Bill Estabrooks was brought up to speed (Tab 186).

253. On August 26, 2009, Chief and Council of PLFN met with the new minister and were advised that negotiations would remain on hold while he and Cabinet colleagues studied the matter (Tab 187).

254. By September 30, 2009, the government was still studying the matter and AMEC was still engaged to look at other options (Tab 188).

255. By November 18, 2009, PLFN was getting concerned about the lack of progress as the new minister continued to study the matter (Tab 189). By January 27, 2010, PLFN's patience was wearing thin (Tab 189).

256. On February 3, 2010, PLFN Chief Aileen Francis wrote to Premier Dexter expressing PLFN's frustration with the lack of progress and pointing out that Northern Pulp's month-to-month Licence to discharge effluent into Boat Harbour was conditional on PLFN's consent, which had been withdrawn as of June 30, 2009 (Tab 190).

### **1.81 PLFN-Northern Pulp Accommodation Agreement No. 2**

257. On February 4, 2010, PLFN and Northern Pulp entered into a second accommodation agreement whereby PLFN agreed to a further period of forbearance to June 30, 2010 (Tab 191).

### **1.82 Province Needs More Time**

258. On February 25, 2010, Minister Estabrooks responded to the Chief's letter to the Premier. He advised that the government took the matter seriously and would be in touch in the coming weeks to set up an "initial" meeting to discuss options for Boat Harbour (Tab 192).

### **1.83 \$75 Million Loan and Benefits Agreement**

259. On March 1, 2010, without any notification to PLFN, the Province announced it had entered into a loan agreement with Northern Pulp (the "Loan Agreement") to lend Northern Pulp and its sister company, Northern Resources, \$75 million to acquire 475,000 acres of forest land from Neenah Paper. This would allow Northern Pulp a secure source of wood fibre into the future. The deal also involved the Province purchasing 55,000 acres of those same lands from Northern Pulp for \$16.5 million (Tab 193). In announcing the deal, the Province made no mention of Boat Harbour or PLFN.

260. The Loan Agreement also required Northern Pulp to make reasonable efforts to negotiate a benefits agreement with PLFN (Tab 195).

261. The Province also announced that Northern Pulp would spend \$5 million to reduce odors (Tab 179). However, the odour reduction program subsequently put in place did not include the Boat Harbour treatment facility and focused only on reducing odor at the mill site (Tab 107).

### **1.84 Benefits Agreement**

262. Negotiations between PLFN and Northern Pulp pursuant to the Loan Agreement began on March 5, 2010 when PLFN received the benefits agreement clause of the Loan Agreement. The agreement required Northern Pulp to use reasonable efforts to negotiate a benefits agreement with PLFN and the Mi'kmaq of Nova Scotia by December 31, 2011 (Tab 195).

### **1.85 PLFN Boycotts Boat Harbor Committee**

263. On March 9, 2010, Chief Francis wrote to Premier Dexter referring to a news article suggesting that the Province had no intention of fulfilling the promise to close the treatment facility made to PLFN in the letter of December 4, 2008 from the previous PC government, and advising that PLFN would not attend any further meetings of the Boat Harbour Committee until the Province stated its plan for the treatment facility (Tab 196).

264. The news article had been published on March 3, 2010, and Minister Estabrooks was quoted as commenting on the December 4, 2008 letter, saying: "It's not the focus of where I'm going" (Tab 194).

### **1.86 PLFN Seeks Canada's Assistance**

265. On March 12, 2010, PLFN advised Canada that it had decided that litigation was its best option and asked Canada to commence an action or stand aside for PLFN to sue (Tab 197, Tab 199).

266. On March 26, 2010, PLFN asked the federal Minister of Indian and Northern Affairs to intercede with Premier Dexter, as the Premier also served as the province's Minister of Aboriginal Affairs (Tab 198).

### **1.87 PLFN Demands Termination of Licence**

267. On April 19, 2010, PLFN advised the Premier that it opposed the renewal of Northern Pulp's Licence to discharge wastewater into Boat Harbour beyond June 30, 2010 (Tab 200).

268. On April 29, 2010, the Premier responded to Chief Francis advising that the AMEC report on options for Boat Harbour had just been completed, and the Province wanted to continue consultation (Tab 202).

### **1.88 2010 AMEC Report**

269. Shortly afterward, PLFN received the AMEC report dated April 21, 2010 (Tab 201). While PLFN had been led to believe that AMEC were considering all options, the executive summary suggests that AMEC was asked only to look at options that allowed the continued use of the settling basins and the ASB at Boat Harbour, while permitting the stabilization basin to be remediated and returned to tidal (Tab 201, p. i).

270. AMEC confirmed that discharging wastewater at either Point C or Point D would not allow the stabilization basin to be opened to tidal influence (Tab 201, p. 67, s. 5.1).

271. Accordingly, a pipeline would be needed to carry wastewater away from the ASB. AMEC selected an outfall location off Lighthouse Point (Tab 201, p. 68, s. 5.2). None of this was new. That option had been considered and rejected by all members of the Boat Harbour Committee in 2005 because the pipeline would need to be routed over reserve lands and would put the outfall location in front of the reserve and Lighthouse Beach (Tab 149).

272. AMEC set out various options based on discharging wastewater off Lighthouse Point. The options ranged from making no changes to the treatment system or to the mill at all to abandoning the entire treatment facility at Boat Harbour in favour of activated sludge treatment (AST) at the mill site and making changes to the mill itself to reduce wastewater volume and improve wastewater quality (Tab 187, p. xi). The AST option was the same as the preferred option in the 1999 HA Simons report (Tab 39).

273. Finally, AMEC provided cost estimates for the various options (Tab 201, p. xi). The cost of the AST option was now \$94 million (Tab 201, p. xi).

### **1.89 Province Refuses to Close Boat Harbour Treatment Facility**

274. On May 3, 2010, PLFN was advised that the Province would not be revoking Northern Pulp's month-to-month Licence to discharge wastewater into the stabilization basin after June 30, 2010.

### **1.90 Notice of Intended Action**

275. On June 30, 2010, PLFN served the Province with notice of intended action (Tab 203).

### **1.91 Regulated Discharge Point Changed from Point D to Point C**

276. On June 30, 2010, the discharge point for purposes of the *PPER* was changed from Point D to Point C.

### **1.92 Appointment of Provincial Negotiator**

277. On July 30, 2010, the Province advised PLFN that it had appointed an outside negotiator, Rod Bugar, to negotiate with PLFN (Tab 204).

### **1.93 PLFN Commences Lawsuit**

278. On September 9, 2010, PLFN commenced a lawsuit against Nova Scotia, Northern Pulp and others in the Nova Scotia Supreme Court, seeking an injunction against the further use of the Boat Harbour treatment facility and the cleanup of Boat Harbour and surrounding lands (the “Lawsuit”) (Tab 205).

### **1.94 Province Initiates Consultation on Boat Harbour Solutions (Again)**

279. On September 23, 2010, the Province sent a request to PLFN for consultation on proposed changes to the Boat Harbour treatment facility. The consultation was to take place under the terms of the new Terms of Reference for a Mi'kmaq/Nova Scotia/Canada Consultation Process (“TOR”) (Tab 207). By Band Council Resolution dated October 19, 2010, PLFN agreed to consultation but opted to conduct the consultation itself, rather than through KMK, as contemplated by the TOR (Tab 208).

### **1.95 Province Initiates Consultation of Northern Pulp’s Industrial Approvals**

280. On November 12, 2010, the Province advised PLFN that Northern Pulp had applied for renewal of its Industrial Approval (“IA”) for the mill and the treatment facility under the Nova Scotia *Environment Act*. The Province explained that the application was to renew and consolidate various existing permits, licences and approvals and, when issued, the new IA would be retroactive to July 30, 2010. The consultation initiated on September 23, 2010, would encompass the IA approval application and the Province was seeking to make a decision by December 31, 2010 but would extend the deadline to January 31, 2011 (Tab 209).

### **1.96 PLFN “Misled”**

281. At the Semi-Annual Meeting of the Confederacy of Mainland Mi'kmaq on December 2, 2010, when challenged about his government’s decision not to close the treatment facility, Premier Dexter responded, “You were told something about the clean up of Boat Harbour that simply was not true. You were told that the facility could be removed, but it cannot.” (Tab 210).

### **1.97 PLFN Agrees to Participate in Various Formal Consultation Processes**

282. On December 9, 2010, PLFN advised the Province that it would participate in the various consultations initiated by the Province but required information and capacity funding given the complexity of the issues involved (Tab 211).

283. On December 16, 2010, the Province agreed to provide consultation funding and suggested a meeting in January 2011 to provide the information PLFN had requested for the consultation (Tab 212).

### **1.98 Canada Declines to Commence Action**

284. On December 19, 2010, Canada responded to PLFN's March 12, 2010 letter advising that Canada had decided not to take any legal action against the Province (Tab 213).

### **1.99 No Benefits Agreement**

285. By December 31, 2011, no benefits agreement had been reached between PLFN and Northern Pulp as contemplated in the \$75 million Loan Agreement. PLFN had earlier rejected an offer of a \$5 million equity position in a green energy project Northern Pulp was undertaking at the mill following discussion at a community meeting. PLFN members refused to own part of the mill as long as problems at Boat Harbour remained unresolved (Tab 206).

### **1.100 Consultation Continued on Industrial Approvals**

286. On February 2, 2011, PLFN provided its position on the IA consultation following a consultation meeting on January 21, 2011. PLFN believed that all harmful impacts from the operation of the mill, and not just the treatment facility, should be considered by the Province in making a decision on the IA. This included any negative effects of air emissions. The Province had refused to disclose the adverse impacts on PLFN from mill operations that it had identified and considered it PLFN's responsibility to advise the Province of the impacts and not the other way around (Tab 214, p. 4). PLFN cited lack of capacity funding and the need for more information and provided some preliminary comments despite the lack of effective consultation (Tab 214).

### **1.101 2011 ADI Report**

287. PLFN retained the services of engineering consulting firm ADI Inc. to consider tertiary (third level) treatment options that might be added to the new AST treatment identified as an option for treating wastewater in the 2010 AMEC report. The goal was to see if wastewater quality could be improved to meet the new federal municipal wastewater regulations that would soon apply to all municipalities, including the Town of Pictou (Tab 216 , at p. ).

288. In its March 31, 2011 report, ADI identified several tertiary treatment systems (Tab 216). One system, an engineered wetland, could be added for as little as \$7.8 million and could even save \$12 million in pipeline costs if the cleaner wastewater could be discharged into Pictou Harbour near the mill rather than at Lighthouse Point several kilometers away (Tab 216, p. 6-10, 43-46).

289. In addition, ADI identified possible economic uses for the heat contained within the wastewater that might offset the cost of a new treatment facility, including for district heating within the Town of Pictou (Tab 216, p. 19-41).

290. PLFN submitted the report to the Province as part of the ongoing consultations.

### **1.102 Capacity Building Proposal**

291. PLFN asked the Province to fund a \$5 million capacity building plan which was prepared with the assistance of Mi'kmaq economic development and band governance consultant, Bernd Christmas (Tab 215). The plan laid bare PLFN's financial and administrative deficits and made the case for significant administrative and capital support.

### **1.103 2011 Industrial Approval**

292. On May 10, 2011, the Province renewed the Industrial Approvals until April 19, 2013 without any requirement for relocating the treatment facility at Boat Harbour (Tab 217).

### **1.104 Boat Harbour Negotiations and Consultation on Boat Harbour Continues**

293. Negotiations continued between the Province and PLFN. Rod Burgar was the Provincial negotiator. By November 1, 2011, terms of a consultation agreement and a negotiation agreement had been reached, but the draft agreements remained unsigned (Tab 221, Tab 220, Tab 219).

294. The agreements were contingent upon PLFN agreeing to a capacity building agreement, under which the Province would pay \$3 million over 2 years for a scaled back version of the capacity building plan PLFN had earlier submitted to the Province (Tab 221, Tab 218). In return for the funding, PLFN had to agree to pause the litigation for 2 years to allow negotiations towards a solution for Boat Harbour to take place.

295. The capacity building agreement was put to a vote at a community referendum on January 25, 2012, but was roundly defeated.

296. On January 26, 2012, PLFN advised the Province of the outcome of the referendum and indicated that PLFN was still prepared to negotiate, even as it advanced the Lawsuit (Tab 222). However, Rod Burgar's mandate to negotiate was terminated and the matter turned over to the Office of Aboriginal Affairs and the Department of Justice (Tab 222).

### **1.105 Amended Notice of Action Served on Defendants**

297. On August 29, 2012, the notice of action which started the Lawsuit was amended and in September 2012 was served on the defendants (Tab 227, Tab 224, Tab 225, Tab 226).

298. On September 13 and 14, 2012, PLFN confirmed that no defences were required from the defendants at that time (Tab 229, Tab 228). No defences have been filed to date.

### **1.106 Second Consultation on Northern Pulp Industrial Approval**

299. On October 9, 2012, the Province initiated consultation on Northern Pulp's application to renew its industrial approval for operating the mill and the Boat Harbour treatment facility. The current IA was set to expire on April 19, 2013 (Tab 230).

300. On December 11, 2012, PLFN advised the Province that it would participate in the consultation on the IA renewal but would require adequate consultation funding and more information (Tab 231).

### **1.107 Province Refuses PLFN Consultation Funding**

301. On January 30, 2013, the Province responded that it would not provide funding for legal counsel (Tab 232).

302. By March 4, 2013, PLFN had not received the many extensive reports that Northern Pulp had filed in respect of its IA renewal application (Tab 233).

303. With the IA set to be renewed shortly, PLFN brought a motion on March 7, 2013 for an injunction against renewing the IA and staying the consultation process until the required information had been provided to PLFN (Tab 234). At the same time, PLFN filed an application for judicial review of the decision not to provide funding for legal counsel for the consultation (Tab 235).

304. Due to the volume of material filed by Northern Pulp on the IA renewal application, the Province decided to extend the existing IA for one year to April 19, 2014 (Tab 269, para. 48). PLFN withdrew the injunction motion (Tab 236).

305. The Province subsequently decided to provide PLFN \$70,000 towards consultation costs, including for legal counsel, and the motion for judicial review was withdrawn (Tab 240).

### **1.108 \$27 Million for Northern Pulp**

306. While PLFN was suing the Province for consultation participation funding, the Province was busy loaning Northern Pulp over \$27 million without any consultation with PLFN and without any conditions regarding the closure of the Boat Harbour treatment facility. The loans included a \$4.5 million loan on April 4, 2014 (Tab 269, para 44), a \$5.382 million loan on April 19, 2013 (Tab 239, Tab 269, para. 39) and a \$17.2 million loan on April 19, 2013 (Tab 238, Tab 269, para. 43).

### **1.109 2013 Motion for Advance Costs**

307. On November 8, 2013, PLFN filed a motion for advance costs in the Lawsuit (Tab 241).

308. The motion was heard on January 27 and 28, 2014. The motion was denied by decision dated February 27, 2014 (Tab 242).

### **1.110 Second Extension of Industrial Approval**

309. As Northern Pulp's extended IA was set to expire on April 19, 2014, as part of the formal consultation process on a new IA PLFN filed lengthy submissions with the Office of Aboriginal Affairs setting out the history of Boat Harbour and identifying the Aboriginal and treaty rights impacted by the treatment facility (Tab 243).

310. On April 17, 2014, Chief Andrea Paul issued a press release after learning that the IA was about to be renewed. In it, she warned that PLFN would oppose the continued use of the Boat Harbour treatment facility by any means possible and called out the Province for dishonouring commitments it made in 1995 and 2008 to close the Boat Harbour treatment facility (Tab 245).

311. The IA was extended on April 19, 2014, but only to January 31, 2015 (Tab 244).

### **1.111 Meeting with New Environment Minister**

312. A Liberal government had just been elected in October 2013. Chief Paul requested a meeting with the new provincial minister of environment, Randy Delorey, who agreed to meet (Tab 246).

313. On April 30, 2014, Chief Paul and other PLFN representatives met with Minister Delorey and reviewed the history of Boat Harbour and the current status. The minister was intrigued by the possibility of a tertiary treatment for the mill wastewater. He advised he needed some time to study the problem.

### **1.112 Pipeline Rupture and Agreement in Principle**

314. On June 10, 2014, the pipeline leading from the mill to Boat Harbour burst in the vicinity of Indian Cross Point near the Mi'kmaw burial site (Tab 269, at para. 49, Tab 253, para. 25-27). PLFN set up a blockade and refused to allow any repairs to the pipeline (Tab 269, para. 51, Tab 253, para. 28).

315. This led to further and immediate consultation between PLFN and the Province which resulted in a promise by the Province to accommodate PLFN's rights by closing the treatment facility within a reasonable period of time and remediating Boat Harbour. This was documented in an agreement in principle dated June 16, 2014 (Tab 169, para. 52 and 53, Tab 253, para. 28, Tab 262, para. 162, Tab 247 ).

316. The Agreement in Principle bound the Province to introduce legislation no later than June 30, 1995 to fix a date for the closure of the Boat Harbour treatment facility (sec. 1) and to negotiate in good faith with PLFN to reach an agreement on (1) the closure date, (2) the remediation of Boat Harbour, and (3) the identification and protection of burial sites at Indian Cross Point (Sec. 2).

### **1.113 The Boat Harbour Act**

317. The Province entered into negotiations with PLFN on a closure date for the treatment facility but when no agreement was reached, the Province proceeded to introduce Bill 89, the

*Boat Harbour Act*, on April 17, 2015. The bill passed final reading with the support of all political parties on May 5, 2015, and received Royal Assent and became law on May 11, 2015 (Tab 250, Tab 269, para. 55). The *Boat Harbour Act* fixed January 31, 2020 as the legislated deadline for using the Boat Harbour treatment facility.

### **1.114 Renewal of Industrial Approval 2015**

318. PLFN and the Province engaged in further consultation for the renewal of the Northern Pulp IA which was set to expire on January 31, 2015 (Tab 248).

319. The approval was issued with more stringent requirements than previous IAs (Tab 249). The IA was appealed by Northern Pulp (Tab 252) and PLFN (Tab 251).

### **1.115 Consultation on New Treatment Facility**

320. On January 9, 2017, the Province initiated consultation with PLFN on a new treatment facility being proposed by Northern Pulp (Tab 254). On November 23, 2017, the final configuration of the proposed treatment facility was presented to PLFN at a consultation meeting (Tab 255).

321. The proposal was for an AST treatment system on the mill site virtually identical to the one recommended by HA Simons in 1993 and by AMEC in 2010. Northern Pulp originally proposed a pipeline with an outfall to the mouth of Pictou Harbour off Lighthouse Point (Tab 258).

### **1.116 More Funding for Northern Pulp**

322. During the course of consultation, PLFN learned that the Province was considering financial assistance to Northern Pulp for construction of the new treatment facility. On January 11, 2018, PLFN advised the Province that it had a duty to consult with PLFN before deciding to provide any funding to Northern Pulp (Tab 256). PLFN reasoned that provision of funding could lead to the continued operation of the mill with air pollution continuing to make its way to PLFN's reserve lands resulting in prolonged adverse impacts.

323. The Province disagreed and replied that it had no duty to consult before providing financial aid to Northern Pulp (Tab 257).

324. PLFN sought judicial review of that decision, and on September 17, 2019, the Nova Scotia Court of Appeal held that the Province did owe a duty to consult before deciding to fund the mill (Tab 262, para. 164).

325. It had come to light during the judicial review proceedings that, unbeknownst to PLFN, in 2016 and 2017, the Province had entered into two funding contribution agreements with Northern Pulp and had already provided funding for Northern Pulp's environmental assessment of the proposed treatment facility under those agreements (Tab 262, p. 17, Tab 269, para. 57).

### **1.117 Northern Pulp Files EARD for Proposed Treatment Facility**

326. Northern Pulp waited until January 31, 2019 to file an environmental assessment registration document (“EARD”) for a new treatment facility under the Nova Scotia *Environment Act* (Tab 260). The design was the same as had been disclosed to PLFN except that the outfall location had been changed to a location near Caribou (Tab 269, para. 62).

### **1.118 Province Might Extend Deadline for Closure**

327. It was certain that Northern Pulp would not be able to build and commission a new treatment facility by the January 31, 2020 deadline under the *Boat Harbour Act*. Northern Pulp asked the Province to extend the deadline (Tab 268, para. 30). Premier McNeil suggested that if Northern Pulp received environmental approval for a new treatment facility before the deadline, he would have to consider an extension (Tab 261,). This left PLFN uncertain about whether the treatment facility would close on January 31, 2020 as Northern Pulp’s application for environmental approval of the new treatment facility was still pending.

### **1.119 No Environmental Approval, No Extension**

328. On December 17, 2019, the Province announced that an environmental assessment report was required before the new treatment facility could be approved (Tab 263). Soon after on December 20, 2019, the Premier announced that the Province would not extend the deadline for ending the operation of the Boat Harbour treatment facility (Tab 264).

### **1.120 Closure of Treatment Facility**

329. With no place to discharge its wastewater after January 31, 2020, Northern Pulp chose to cease production and idle the mill (Tab 265).

### **1.121 No Remediation Agreement**

330. Following the Agreement-in-Principle of June 16, 2014, representatives of PLFN had met with representatives of the Province to negotiate an agreement on the closure date for the Boat Harbour treatment facility and the remediation of Boat Harbour as contemplated by the Agreement-in-Principle. Initially, the focus was on the closure date. When no agreement was reached the Province chose the closure date and enacted the *Boat Harbour Act*.

331. No agreement on the remediation of Boat Harbour was ever reached. Instead, the Province hired consultants, held a single formal consultation meeting with PLFN, informally engaged with PLFN members, and, on December 18, 2018, submitted a summary of a proposed remediation plan to Canada to begin the environmental assessment process under the *Environmental Assessment Act* (Tab 259). The plan was contingent on the closure of Boat Harbour treatment facility and included dredging over one million cubic meters of toxic waste from Boat Harbour (Tab 259, p. ii). The Province proposed to expand the existing toxic landfill on the shores of Boat Harbour which was first built in 1996 for the long term storage of the contaminated sludge (Tab 259, p. iii).

332. PLFN opposed the use of the existing landfill at Boat Harbour (Tab 259, p. viii). Only one consultation meeting took place regarding remediation and that occurred on April 19, 2028 (Tab ).

### **1.122 Ministerial Order for Decommissioning Plan**

333. On January 29, 2020, on the eve of closure, the Province issued a ministerial order under the *Environment Act* requiring, among other things, that Northern Pulp prepare a plan for the decommissioning of the treatment facility, including the removal of toxic sludge in the ASB (Tab 266).

334. Northern Pulp was required under the terms of the 1995 Memorandum of Understanding between the Province and Scott Maritimes, to remove all toxic sludge from the ASB which had accumulated since 1995 (Tab 95, s. 4.01(f)).

335. Northern Pulp was to dispose of the sludge from the ASB at its own industrial landfill which was located near the mill (Tab 271, para. 29). Nova Scotia and the Province had agreed that 81,375 m<sup>3</sup> was the volume of sludge to be removed from the ASB by Northern Pulp (Tab 271, para. 30).

### **1.123 Northern Pulp Seeks Creditor Protection**

336. On June 19, 2020, Northern Pulp applied for protection from its creditors under the Canadian *Companies' Creditors Arrangement Act* ("CCAA") and the same day an initial stay order was granted (Tab 267). The stay has been extended from time to time ever since, and the most recent order extended the stay until August 29, 2023 (Tab 272).

### **1.124 Province Decides to Put Northern Pulp's Sludge into Boat Harbour Landfill too**

337. On March 22, 2021, the Province and Northern Pulp agreed that the Province would take over responsibility for the removal of all the sludge from the ASB, including the 81,375 m<sup>3</sup> for which Northern Pulp was responsible (Tab 271), para. 30, Tab 270, p. 8). PLFN was not consulted on this decision even though it meant adding even more sludge to the Boat Harbour landfill, the continued use of which PLFN already opposed (Tab 259, p. viii).

### **1.125 Current Status of Remediation**

338. The Province's application for environmental approval of its plan to remediate Boat Harbour and place the contaminated sludge in the Boat Harbour landfill is still before the Impact Assessment Agency of Canada ("IAAC"). PLFN opposes the plan for long term storage of toxic waste in the existing Boat Harbour landfill.

### **1.126 Impact on PLFN community**

339. The impact of the wastewater facility on PLFN has been immeasurable. Chief Andrea Paul described it this way in an affidavit sworn November 6, 2013 which was filed in connection with the Lawsuit:

The wastewater treatment facility has been like a heavy weight dragging down the community – physically, emotionally, spiritually, culturally, socially and economically - for decades. The community has lost hope and trust after decades

of broken promises by the Province and the owners of the mill.

340. The suffering of PLFN was acknowledged by the Province in the December 4, 2008 accommodation letter:

As Minister Baker so graphically stated: "To say that the Band has been long suffering would be a masterful understatement of the obvious." It is our unwavering intention to end that suffering as quickly as possible. It should have been done a long time ago. [Tab 130]

341. Judge Atwood in his sentence decision in the Northern Pulp prosecution over the pipeline leak in 2014, referred to the adverse impact of the treatment facility on PLFN as beyond dispute:

[25] In my view, while the historical account in Chief Paul's statement might extend beyond what counsel assert is admissible, the truth of the damaging impact that the pulp mill at Abercrombie Point and its toxic effluent-treatment site at Boat Harbour has had on the well-being of the Pictou Landing First Nation—and continues to have—is so conspicuous and notorious as to be beyond dispute. [Tab 253, para. 25]

342. Judge Atwood hailed the 2014 blockade by PLFN:

[28] As effective as the remedial steps taken by Northern Pulp might have been, it was action by the Pictou Landing First Nation that brought about meaningful movement toward lasting environmental protection: ...