Boat Harbour Remediation Project

FINAL POSITION OF PICTOU LANDING FIRST NATION ON PROPOSED BOAT HARBOUR REMEDIATION PROJECT

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Pictou Landing Fist Nation

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1 Executive Summary

1.1 Introduction

1. Pictou Landing First Nation ("PLFN") does not consent to the use of Aboriginal title land for the long-term storage of hazardous waste as proposed by the Province of Nova Scoita (the "Province") in a project description and Environmental Impact Statement ("EIS") submitted to the Impact Assessment Agency of Canada ("IAAC") for a project to remediate Boat Harbour and lands around Boat Harbour (the "Project").

2. The Project calls for the removal of hazardous waste from Boat Harbour and surrounding lands and its permanent storage in an existing hazardous waste landfill at Boat Harbour (the "Boat Harbour Landfill"). The Boat Harbour Landfill is located on lands to which PLFN claims Aboriginal title.

3. The Project as proposed will have significant adverse impacts on PLFN and should not be approved under the ***Canadian Environmental Assessment Act*** ("CEAA").

4. These impacts include: (a) interference with the use and enjoyment of Aboriginal title lands; (b) interference with the use and enjoyment of IR 37 and IR 24G; (c) interference with the use and enjoyment of fee simple lands owned by PLFN; and (d) psychological and cultural trauma given the history of Boat Harbour.

5. PLFN has consistently expressed its opposition to the use of the Boat Harbour Landfill for the long-term storage of hazardous waste. The Province refused to negotiate the terms of the a remediation agreement as required by the agreement in principle reached with PLFN on June 16, 2014 (the "Agreement in Principle") and instead developed the Project without PLFN's agreement.

6. Further, the Province failed to adequately consult with PLFN as required under s. 35 of the ***Constitution Act, 1982***, before finalizing the Project. In fact, only one consultation meeting was held prior to Cabinet approval of the Project in August 2018. At that meeting, PLFN was led to believe that the Province was considering other options for long-term storage of the hazardous waste from Boat Harbour other than the Boat Harbour Landfill. However, that was not the case as the Province had made up its mind.

7. The mitigation and accommodation measures proposed by the Province are inadequate to address the significant adverse impacts of the Project.

8. The Province has not adequately considered other possible sites. PLFN's engineers have identified 15 potential sites within a 10-kilometre radius of Boat Harbour that may be suitable for a landfill. The Province has taken no steps to analyse any of those sites. An existing landfill near Northern Pulp's mill is suitable to accept Boat Harbour waste and meets all NS Environment's parameters.

9. PLFN has asked the Province to commit to the construction of another landfill where the waste from Boat Harbour could be stored long-term. Such a commitment would have allowed PLFN to consent to the use of the Boat Harbour Landfill as a temporary measure, allowing material dredged from Boat Harbour to be dewatered before being loaded and transported to another landfill. However, the Province has refused to commit to another landfill.

10. As a result, PLFN has little choice but to oppose the Project.

1.2 Aboriginal Title

11. PLFN asserts Aboriginal title to the lands surrounding Boat Harbour, including the land upon which the Boat Harbour Landfill is located. The strength of the Aboriginal title claim is very strong given the court's findings in ***R. v. Marshall***, 2001 NSPC 2, 2001 CarswellNS 105, and the historical evidence available. Because of the strength of the claim, the Province has a fiduciary duty to preserve PLFN's interest in the claimed land pending resolution of the claim. If the Province proceeds with increasing the size of the Boat Harbour Landfill in the face of PLFN's claim and without PLFN's consent, the Province will only be required to remove the contaminants from the Boat Harbour Landfill if the claim is resolved in PLFN's favour. PLFN never consented to the existing Boat Harbour Landfill in the first place and could not have done so in any event because such use is compatible with the nature of Aboriginal title. It makes little sense to add more contaminated waste from Boat Harbour to the Boat Harbour Landfill when there is a high probability that it will need to be removed once Aboriginal title is established. The Province is silent on PLFN's land claim.

1.3 Existing Landfill Infringes Aboriginal Rights

12. The existing Boat Harbour Landfill is an unjustified infringement on PLFN's s.35 Aboriginal and Treaty rights. The Province acknowledges that the existing landfill limits the use of IR 37 and IR 24G. The existing landfill was commissioned in 1995 without the consent of PLFN or Canada. PLFN was never compensated for the adverse impacts of the Boat Harbour Landfill on IR 37 and IR 24G. The infringement of PLFN's rights to use its reserves lands is not justified under the ***Sparrow*** test. The Honour of the Crown prevents the Province from relying on the existence of the Boat Harbour Landfill as a reason to justify its continued and expanded use.

1.4 Lack of Remediation Agreement a Breach of s. 35 Rights

13. The Province and PLFN entered into an agreement in principle dated June 16, 2014 (the "Agreement in Principle") in which the Province agreed to negotiate an agreement with PLFN governing the remediation of Boat Harbour. The Agreement in Principle is an accommodation agreement flowing from the Province's duty to consult and accommodate PLFN under s. 35 of the ***Constitution Act, 1982*** ("Section 35"). The rights of PLFN under the Agreement in Principle are protected under Section 35. However, no negotiations toward a remediation agreement have ever taken place. Instead, the Province unilaterally decided that the remediation project would involve the use of the existing Boat Harbour Landfill for the long-term storage of the hazardous waste to be dredged from Boat Harbour. The Province was fully aware that PLFN opposed the

use of the existing Boat Harbour Landfill for that purpose and in fact PLFN wanted the existing landfill removed as part of the remediation. While the Province has made considerable effort to persuade PLFN members to go along with its decision, the fact remains that the Province has not even attempted to negotiate a remediation agreement with PLFN. This is inconsistent with both the letter and spirit of the Agreement in Principle and with the Honour of the Crown and is an infringement of the PLFN's Section 35 rights. As a result, the proposed use of the Boat Harbour Landfill cannot be approved until good-faith negotiations have taken place with a view to reaching a remediation agreement.

1.5 Consultation Inadequate to Date

14. The Province recognizes that it has a duty under Section 35 to consult with, and if necessary, accommodate, PLFN with respect to the Project and the use of the existing Boat Harbour Landfill. While it commenced consultation in April 2018, the consultation process has not been adequate. The Province did not give PLFN an adequate opportunity to make submissions and present evidence before filing the Project. It had already made up its mind about the use of the existing landfill. The Province continued its pattern of ignoring its Constitutional duty to consult when it decided to relieve Northern Pulp Nova Scotia Corporation ("Northern Pulp") of its obligation to remove 81,375 m^3 of contaminated sludge from the Boat Harbour treatment facility to Northern Pulp's own landfill at Abercrombie Point. Instead, the Province decided that it would place the Northern Pulp sludge in the existing Boat Harbour Landfill with other contaminants from Boat Harbour as part of the Project. This means that if the Project is approved, an additional 89,375 m^3 of contaminated sludge will be placed in the existing Boat Harbour Landfill, despite PLFN's opposition. A proposal put forward in breach of the duty to consult should not be accepted.

1.6 Proposed Accommodation/Compensation Inadequate

15. The Province suggests that it is transferring 173 hectares of land as partial accommodation for the continuing impacts of the Boat Harbour Landfill on PLFN. These 173 hectares are located adjacent to Boat Harbour and the estuary leading to Boat Harbour. PLFN never agreed to the transfer of those lands as compensation for the adverse impacts of the Boat Harbour Landfill. In fact, 128 hectares of those lands were already promised to PLFN as early as 1992 as consideration for PLFN allowing the continued use of the Boat Harbour treatment facility for fixed term. As such, the Province has a long-standing legal obligation to transfer 128 of the 173 hectares to PLFN and cannot assert that those 128 hectares are being transferred to accommodate PLFN for the adverse impacts of the Boat Harbour Landfill.

16. Even if all 173 hectares were being transferred as compensation for the adverse impacts of the Boat Harbour Landfill, it does not adequately accommodate PLFN. Compensation for impacts to reserve lands must be determined in accordance with the principles set out in the recent decision of the Supreme Court of Canada in ***Southwind v. Canada***, 2021 SCC 28, and cannot be imposed unilaterally. ***Southwind*** requires that compensation be determined through negotiations aimed at obtaining PLFN consent. If consent is obtained, negotiation will result in compensation that reflects both the value of using the Boat Harbour Landfill to the Project and

PLFN's own views on the inherent value of its lands and the losses associated with any adverse impacts. Such negotiations have not taken place and the Project should be rejected until PLFN's consent has been obtained and adequate compensation negotiated.

1.7 Other Lands Available

17. There are 109 parcels of Crown land and 97 parcels of private land within a 50 km radius of Boat Harbour that may be suitable based on a desktop review of the land and site characteristics. Of these, 15 parcels are within 10 km of Boat Harbour. Another suitable location is the existing landfill owned by Northern Pulp at Abercrombie Point. Northern Pulp has expressed a willingness to explore this option. The Province has not explored any other options.

1.8 Boat Harbour Landfill Worst Option Based on Environmental Criteria

18. Using the criteria for siting a hazardous waste landfill developed by NS Environment for the purposes of the Alternative Site Assessment, an analysis of the Mount William Site, the Boat Harbour Landfill site, and the Northern Pulp landfill site, shows that the Boat Harbour Landfill site is inferior to both the Mount William Site and the Northern Pulp landfill site, and that the Northern Pulp landfill site is the best option of them all, as it meets all environmental siting criteria.

1.9 Socio-Economic and Cultural Impacts of Continued use of Boat Harbour Landfill

19. The decision as to where the toxic waste to be dredged from Boat Harbour will be stored indefinitely, must take into account the historic trauma suffered by Pictou Landing First Nation. In addition to the historic trauma common to many Indigenous Peoples of Canada arising from the taking of traditional lands, violence, disease and government policies aimed at destroying Indigenous culture, including most notability, the Indian Residential School system and the Indian Act, the imposition of the Boat Harbour treatment facility was a unique source of trauma to PLFN.

20. The indifference of both the provincial and federal levels of government to the adverse impacts of the Boat Harbour treatment facility on the community both continued and exacerbated the trauma experienced by PLFN. The long history of broken promises around the closure and cleanup of the Boat Harbour treatment facility speaks to this.

21. The result has been worse individual health, including mental health, outcomes within PLFN and an overall feeling of hopelessness and malaise where cynicism and distrust for government abound. This has affected PLFN's economic prospects.

22. The decision to exclude the Boat Harbour Landfill from the scope of the Boat Harbour cleanup and to instead increase its size and use it indefinitely to store 10 times the current volume of toxic waste, will simply perpetuate the historic trauma associated with the Bloat Harbour treatment facility. The socioeconomic and cultural effects of the historic trauma will continue.

1.10 Conclusion

23. The Boat Harbour Landfill is not suitable for the long-term storage of hazardous waste from Boat Harbour because it is located on lands over which PLFN has a strong claim for Aboriginal title and constitutes a continuing infringement of PLFN's Section 35 rights since it adversely impacts the use and enjoyment of IR 37 and IR 24G. The Project was put forward by the Province without having made any effort to negotiate a remediation agreement with PLFN as it was honour-bound to do under the Agreement in Principle. The failure to negotiate in good faith is a violation of PLFN's Section 35 rights. The Province has failed to adequately consult with PLFN on the use of the Boat Harbour Landfill before finalizing the Project for submission to IAAC. The proposed accommodation is inadequate and was never agreed to by PLFN. The Boat Harbour Landfill site does not meet NS Environment's own proposed hazardous waste landfill siting criteria, and the Northern Pulp landfill site is the best site with no exceedances of the NS Environment criteria. There are plenty of other sites on Crown land and private land in the vicinity of Boat Harbour that may be suitable and which the Province has not assessed. The Province has fallen short of the goal of reconciliation with respect to the Project insofar as the continued use of the Boat Harbour Landfill is concerned. Continued use of the Boat Harbour Landfill will prolong the historic trauma associated with Boat Harbour to the health, socioeconomic, and cultural detriment of PLFN. PLFN continues to oppose the long-term use of the Boat Harbour Landfill to store hazardous waste removed from Boat Harbour during the Project.

2 Introduction

24. The remediation of Boat Harbour is just the latest chapter in a centuries-long fight to retain and protect the traditional lands of the Pictou Landing First Nation. The Mi'kmaq have asserted a claim to the lands in the area since the 1700s and PLFN's ancestors steadfastly remained on the land in the vicinity of Boat Harbour in the face of calls from European settlers to remove them.

25. The ancestors persevered, and eventually persuaded the Province to set aside a small amount of land in the area for PLFN adjacent Boat Harbour which became known as Indian Reserve No. 24 ("IR 24") where the PLFN community currently resides. Later nearby IR 37 and IR 24G also achieved reserve status.

26. Boat Harbour was a significant place for PLFN. It was called A'se'k or "the other room" and was frequented for hunting, fishing, trapping, harvesting and recreation. It was meeting place in the summer for other Mi'kmaw communities.

27. In 1967, almost 100 years after IR24 was finally set aside for PLFN, the area came under assault from the discharge into Boat Harbour of 25 million gallons of wastewater each day from the newly established pulp mill at Abercrombie Point. The Province had agreed to treat the wastewater and established a treatment facility at Boat Harbour adjacent to IR24, IR 24G and IR 37.

28. The impact of the treatment facility on PLFN was devastating. Elders recall the horror they felt as they watched thousands of fish writhing at the shoreline of Boat Harbour trying to escape the brown and septic waters, desperately seeking oxygen. Later they recalled the putrid odours invading their tiny community and watching their houses turn black as the chemicals in the air reacted with the paint. The air seemed poisoned. People stayed indoors as much as possible. Mothers and fathers feared for the health of their little ones. Sons and daughters feared for the health of their elderly parents and relatives. Members shunned gathering food and hunting in the area out of concern for contamination. No fishing was possible. PLFN culture changed overnight. The treatment facility and the pollution at Boat Harbour has had an immeasurable impact on PLFN for over 5 decades.

29. The Province's role in the establishment of the Boat Harbour treatment facility was unfortunate and notorious and involved misrepresenting the adverse impacts of the treatment facility on PLFN, paying inadequate compensation, and failing to remediate septic conditions when they arose as agreed as they were legally obligated to do. Whatever trust PLFN may have had in government was eroded. The fact that the community had been targeted because they were only a "small band of Indians" was demeaning and frustrating. The Province has since described the operation of the wastewater treatment facility at Boat Harbour as environmental racism.

30. While the injustice eroded some members' sense of dignity and self-worth, others spent inordinate amounts of their time fighting for change as PLFN kept up its battle for closure of the treatment facility, the cleanup of Boat Harbour, and the return of the lands around Boat Harbour

to PLFN. Finally in 1991, the Province agreed. However, it would take almost 30 years for the treatment facility to be closed. During that time PLFN relied on the promise of closure and cleanup in agreeing to forbear from taking any action to close the treatment facility first for 4 years, and then for an additional 10 years, and later for an additional 3 years. In the end, in 2010, the Province refused to honour its promises to close the Boat Harbour treatment facility, leading to a lawsuit by PLFN against the Province to force the closure of the treatment facility and the cleanup of Boat Harbour. That lawsuit is still before the court.

31. In 2014, the Province and PLFN entered into the Agreement in Principle, an accommodation agreement, in which the Province promised to enact legislation to close the Boat Harbour treatment facility by a date to be negotiated with PLFN and to negotiate a remediation agreement with PLFN to govern the cleanup of Boat Harbour. The Province selected a closure date, January 31, 2020, when it did not reach an agreement on a closure date with PLFN, and later submitted the within Project for environmental approval without attempting to negotiate a remediation agreement with PLFN.

32. The forgoing is a brief summary of the history of Boat Harbour. Submitted with this submission is a document brief summarizing more of the salient facts relating to PLFN's struggle to seek redress for the Boat Harbour treatment facility with supporting documents (the "Document Brief"). The Document Brief is intended to form an integral part of these submissions and is incorporated herein by reference.

33. The Project calls for the use of the Boat Harbour Landfill for the long-term storage of the contaminated sludge and other contaminated material to be generated by the Project. This aspect of the Project will create significant adverse impacts on PLFN.

34. First, the Boat Harbour Landfill sits on land over which PLFN has a strong claim to Aboriginal title and the continued use o the Boat Harbour Landfill constitutes an unjustified infringement of PLFN's Aboriginal rights.

35. Second, the existing and any future use of the Boat Harbour Landfill is an unjustified infringement of its Aboriginal right to the use and enjoyment of its neighboring reserve and fee simple lands.

36. Third, the Project was submitted contrary to the Province's obligation under s. 35 of the ***Constitution Act, 1982***, to negotiate the terms of the remediation of Boat Harbour with PLFN pursuant to the 2014 Agreement in Principle.

37. Fourth, the Province failed to adequately consult with PLFN before Cabinet decided that the Project would involve the long-term use of the Boat Harbour Landfill.

38. Fifth, the proposed mitigation and accommodation measures included in the Project are inadequate.

39. Sixth, the Province has failed to adequately review other alternatives to the proposed use of the Boat Harbour Landfill when other options are available.

40. Seventh, the Boat Harbour Landfill is inferior to other available sites.

41. Finally, the continued use of the Boat Harbour Landfill will perpetuate the historic trauma suffered by PLFN.

42. In conclusion, the Project will have a significant adverse impact on PLFN's Aboriginal and treaty rights which the Province cannot justify. The Province has not adequately considered alternative sites. The Province has failed to fulfil its constitutional obligation to consult and accommodate PLFN in the Project design.

3

3 Aboriginal Title

3.1 Overview

43. PLFN asserts Aboriginal title to the lands surrounding Boat Harbour, including the land upon which the Boat Harbour Landfill is located. The strength of the Aboriginal title claim is very strong given the judicial findings in ***R. v. Marshall***, *supra*, and the historical evidence available to the Province. Because of the strength of the claim, the Province has a fiduciary duty to preserve PLFN's interest in the land pending resolution of the claim and to obtain PLFN's consent to any use of the land. If the Province proceeds with increasing the size of the Boat Harbour Landfill in the face of PLFN's claim without PLFN's consent, the Province will be required to remove the contaminants from the Boat Harbour Landfill if the title claim is resolved in PLFN's favour. PLFN never consented to the Boat Harbour Landfill in the first place and could not have done so in any event because such use is compatible with the nature of Aboriginal title. It makes little sense to add more contaminated waste from Boat Harbour to the Boat Harbour Landfill when there is a high probability that it will need to be removed once Aboriginal title is established. The Province is silent on PLFN's land claim in its Alternative Site Assessment and the EIS.

3.2 Assertion of Aboriginal Title Claim

44. The Province is fully aware of PLFN's asserted claim to Aboriginal title to the lands around Boat Harbour. The claim was made explicit in a November 19, 2008 letter to the Province in support of the PLFN's demand for the closure of the Boat Harbour treatment facility (Document Brief, Tab 180, at p. 4).

3.3 Province's Position on Title Claim

45. In Section 1.3 of the EIS, the Province identifies the historical significance of Boat Harbour to PLFN, but does not mention PLFN's claim for Aboriginal title or the Province's position on the claim:

> 1.3.5 … Historically, A'se'k was a gathering place where food, knowledge, and skills were exchanged between generations and amongst family groups. The land was traditionally used by the Mi'kmaq for refuge, recreation, fishing, hunting and gathering, as well as for physical, mental, spiritual, and emotional purposes.

46. In section 7.3.15. of the EIS, the Province adopts PLFN's traditional understanding of the boundaries of its traditional territory:

> The PLFN Well-Being Baseline Study has identified the following spatial boundary: "…spatial boundaries extend to the traditional territory of the Piktukowaq, including the area in and around A'se'k."

> The Regional Study Area, consistent with the MEKS Study Area, encompasses this perspective.

47. Despite the forgoing, the Province has never formally acknowledged PLFN's claim of Aboriginal title to the lands around Boat Harbour or set out its analysis of the strength of the claim.

3.4 Strength of Aboriginal Title Claim

48. On March 8, 2001, Chief Judge Patrick Curran of the Nova Scotia Provincial Court released his decision in ***R. v. Marshall***, *supra*. That case dealt with forest harvesting rights on certain inland areas of Nova Scotia. In his decision, at para. 143, Chief Judge Curran "concluded that the Mi'kmaq of the 18th century on mainland Nova Scotia probably had aboriginal title to lands around their local communities". This finding was not disturbed on appeal: ***R. v. Marshall***, 2005 SCC 43, at paras. 80-83.

49. The Mi'kmaq Ecological Knowledge Study ("MEKS") report filed as Appendix T to the EIS refers to evidence of a Mi'kmaq village in the vicinity of Boat Harbour in the early 18th century (at p. 26-27):

> Within the Study Area, there was an encampment located on the eastern shore of the East River of Pictou, opposite the present-day Loading Ground-Dunbar Point. This location was interpreted by the source from a 1744 map by cartographer Bellin and published by 26 Charlevoix in 1748. The map does depict Pictou Harbour in some detail with "Village Sauvage" calligraphy positioned to the east of the East River of Pictou but could also be intended for the Merigomish-Antigonish location. *(20)* However, the source backs up their interpretation with accounts by English settlers of the rounded flat point of land being cleared upon their arrival and subsequent ploughing turned up European as well as some early Mi'kmaq artifacts and oyster shells. Similar artifacts and oyster shells were also found in the 1800's during ploughing of William Dunbar's fields at present day Dunbar Point on the western shore of the East River of Pictou. Ploughing of fields at Frasers Point and Middle River Point also turned up an abundance of oyster shells along with stone tools indicating frequent use by early peoples. *(19)*
>
> There is a known Mi'kmaq burial ground on Indian Cross Point located on a point of land on the eastern shore of the East River of Pictou. The 1877 source reports that a 10-foothigh iron cross had stood at that location. Indian Cross Point was known to the Mi'kmaq as *soogunagade* translated as *The Rotting Place.* Indian Cross Point was in use as burial ground by Mi'kmaq until a few years before the 1877 source which reported the burials were marked by rows of flat stones which were already partially grown over by grass at that time. Erosion of the river bank which deposited human bones along the shore was also reported by the source.

50. The combined effect of Chief Judge Curran's finding that the Mi'kmaq probably had Aboriginal title to the lands around their settlements and the historical evidence of a Mi'kmaq settlement adjacent Boat Harbour, suggests that PLFN's claim to Aboriginal title to the lands around Boat Harbour is very strong.

51. Further, ***Marshall*** was decided before ***Tsilhqot'in Nation v. British Columbia***, 2014 SCC 44, which clarified that semi-nomadic Indigenous peoples occupied land beyond the specific sites of their settlement so as to give rise to Aboriginal title beyond those specific sites. The Court held, at. para. 50:

> Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty.

52. Chief Judge Curran had applied a narrower test in ***R. v. Marshall***, *supra*. Under the ***Tsilhqot'in*** expanded concept of occupation, PLFN's claim would be even stronger given that PLFN would not have to prove that the lands around Boat Harbour were within a settlement site and would only need to show that the lands were within tracks of land effectively controlled by PLFN's ancestors and used for hunting, fishing and other activities - which the Province has acknowledged.

53. While Aboriginal title can be extinguished, PLFN's title to the lands around Boat Harbour has not been extinguished.

54. Before Confederation authority to extinguish Aboriginal title rested with the Imperial Crown. This authority could have been delegated by the Imperial Crown to a colonial legislature, however this must be clearly proven. In ***Sappier; R. v. Gray,*** 2006 SCC 54, at para. 58, the Supreme Court of Canada held that "it is not at all clear that the colonial legislature of New Brunswick was ever granted the legal authority by the Imperial Crown to extinguish aboriginal rights." The same can be said about the colonial legislature of Nova Scotia – it is unlikely that the legislature was ever given authority to extinguish Aboriginal title. The Province bears the burden of proving extinguishment if it is asserted: ***R. v. Sappier***, at para. 57.

55. Since Confederation, the Province has had no authority to extinguish Aboriginal title by virtue of s. 91 of the ***Constitution Act, 1867*** which gave the Dominion of Canada exclusive jurisdiction over "Indians, and Lands reserved for Indians". Canada has exclusive jurisdiction to extinguish Aboriginal title: ***Delgamuukw v. British Columbia,*** [1997] 3 S.C.R. 1010, at para. 173. Canada has not extinguished Aboriginal title in the lands around Boat Harbour.

56. As indicated above, the Province has not expressed its position on the strength of PLFN's claim of Aboriginal title to the lands around Boat Harbour, but it would appear to be very strong.

3.5 Impact of Establishing Aboriginal Title

57. Should PLFN establish Aboriginal title to the lands around Boat Harbour, including the land upon which the Boat Harbour Landfill is located, the use to which the land can be put is limited by the very nature of Aboriginal title itself. Use of Aboriginal title land is subject to the restriction that it cannot be used in a manner which is inconsistent with the relationship of the Aboriginal peoples to the land, in the sense that no activity will be permitted which is akin to equitable waste and which would interfere with the enjoyment of Aboriginal title by future generations. This is an important concept and reviewed extensively in ***Delgamuukw***, *supra*, at para. 126-129:

> 126 I arrive at this conclusion by reference to the other dimensions of aboriginal title which are *sui generis* as well. I first consider the source of aboriginal title. As I discussed earlier, aboriginal title arises from the prior occupation of Canada by aboriginal peoples. That prior occupation is relevant in two different ways: first, because of the physical fact of occupation, and second, because aboriginal title originates in part from pre-existing systems of aboriginal law. However, the law of aboriginal title does not only seek to determine the historic rights of aboriginal peoples to land; it also seeks to afford legal protection to prior occupation in the present-day. Implicit in the protection of historic patterns of occupation is a recognition of the importance of the continuity of the relationship of an aboriginal community to its land over time.
>
> 127 I develop this point below with respect to the test for aboriginal title. The relevance of the continuity of the relationship of an aboriginal community with its land here is that it applies not only to the past, but to the future as well. That relationship should not be prevented from continuing into the future. <u>As a result, uses of the lands that would threaten that future relationship are, by their very nature, excluded from the content of aboriginal title.</u>
>
> 128 <u>Accordingly, in my view, lands subject to aboriginal title cannot be put to such uses as may be irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land which together have given rise to aboriginal title in the first place</u>. As discussed below, one of the critical elements in the determination of whether a particular aboriginal group has aboriginal title to certain lands is the matter of the occupancy of those lands. Occupancy is determined by reference to the activities that have taken place on the land and the uses to which the land has been put by the particular group. If lands are so occupied, there will exist a special bond between the group and the land in question such that the land will be part of the definition of the group's distinctive culture. It seems to me that these elements of aboriginal title create an inherent limitation on the uses to which the land, over which such title exists, may be put. For example, if occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (*e.g.*, by strip mining it). Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g., by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot).

> 129 It is for this reason also that lands held by virtue of aboriginal title may not be alienated. Alienation would bring to an end the entitlement of the aboriginal people to occupy the land and would terminate their relationship with it. I have suggested above that the inalienability of aboriginal lands is, at least in part, a function of the common law principle that settlers in colonies must derive their title from Crown grant and, therefore, cannot acquire title through purchase from aboriginal inhabitants. It is also, again only in part, a function of a general policy "to ensure that Indians are not dispossessed of their entitlements": see ***Mitchell v. Sandy Bay Indian Band***, [1990] 2 S.C.R. 85 (S.C.C.) at p. 133. What the inalienability of lands held pursuant to aboriginal title suggests is that those lands are more than just a fungible commodity. The relationship between an aboriginal community and the lands over which it has aboriginal title has an important non-economic component. The land has an inherent and unique value in itself, which is enjoyed by the community with aboriginal title to it. The community cannot put the land to uses which would destroy that value.

58. This restriction protects Aboriginal title and Reserve lands for future generations and finds an analogy in the concept of equitable waste at common law. In ***Delgamuukw***, *supra*, at para. 130-131:

> 130 I am cognizant that the *sui generis* nature of aboriginal title precludes the application of "traditional real property rules" to elucidate the content of that title (***St. Mary's Indian Band v. Cranbrook (City)***, [1997] 2 S.C.R. 657 (S.C.C.) at para. 14). Nevertheless, a useful analogy can be drawn between the limit on aboriginal title and the concept of equitable waste at common law. Under that doctrine, persons who hold a life estate in real property cannot commit "wanton or extravagant acts of destruction" (E. H. Burn, ***Cheshire and Burn's Modern Law of Real Property*** (14th ed. 1988), at p. 264) or "ruin the property" (Robert E. Megarry and H. W. R. Wade, ***The Law of Real Property***, 4th ed. (1975) at p. 105). This description of the limits imposed by the doctrine of equitable waste capture the kind of limit I have in mind here.

59. Later in ***Delgamuukw*** the Court restated that Aboriginal title land cannot be used for purposes inconsistent with its use by future generations. ***Delgamuukw***, *supra*, at para 154:

> 154 I should also note that there is a strong possibility that the precise nature of occupation will have changed between the time of sovereignty and the present. I would like to make it clear that the fact that the nature of occupation has changed would not ordinarily preclude a claim for aboriginal title, as long as a substantial connection between the people and the land is maintained. <u>The only limitation on this principle might be the internal limits on uses which land that is subject to aboriginal title may be put, i.e., uses which are inconsistent with continued use by future generations of aboriginals.</u>

60. The Court in ***Tsilhqot'in***, *supra*, recently adopted this analysis at paras. 74-75.

61. Because of this restriction, PLFN could not have consented to any use of Aboriginal title land that is inconsistent with Aboriginal title. This would certainly preclude a hazardous waste

landfill. The land would need to be surrendered first before such use was permitted. See ***Delgamuukw***, *supra*, at para. 131:

> 131 Finally, what I have just said regarding the importance of the continuity of the relationship between an aboriginal community and its land, and the non-economic or inherent value of that land, should not be taken to detract from the possibility of surrender to the Crown in exchange for valuable consideration. On the contrary, the idea of surrender reinforces the conclusion that aboriginal title is limited in the way I have described. If aboriginal peoples wish to use their lands in a way that aboriginal title does not permit, then they must surrender those lands and convert them into non-title lands to do so.

62. Once Aboriginal title is established, and even before, governments may need to reassess their plans for claimed lands. See ***Tsilhqot'in***, *supra*, at para. 90:

> 90 After Aboriginal title to land has been established by court declaration or agreement, the Crown must seek the consent of the title-holding Aboriginal group to developments on the land. Absent consent, development of title land cannot proceed unless the Crown has discharged its duty to consult and can justify the intrusion on title under s. 35 of the *Constitution Act, 1982*. The usual remedies that lie for breach of interests in land are available, adapted as may be necessary to reflect the special nature of Aboriginal title and the fiduciary obligation owed by the Crown to the holders of Aboriginal title.
>
> 91 The practical result may be a spectrum of duties applicable over time in a particular case. At the claims stage, prior to establishment of Aboriginal title, the Crown owes a good faith duty to consult with the group concerned and, if appropriate, accommodate its interests. As the claim strength increases, the required level of consultation and accommodation correspondingly increases. Where a claim is particularly strong — for example, shortly before a court declaration of title — appropriate care must be taken to preserve the Aboriginal interest pending final resolution of the claim. Finally, once title is established, the Crown cannot proceed with development of title land not consented to by the title-holding group unless it has discharged its duty to consult and the development is justified pursuant to s. 35 of the *Constitution Act, 1982*.
>
> 92 Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title.

63. Clearly, it would be reckless for the Province to proceed to add 9 times as much contaminated sludge to the Boat Harbour Landfill as already exists there, considering PLFN's strong claim for Aboriginal title to those lands and its opposition to the landfill.

64. The continued use of the Boat Harbour Landfill would clearly be an unjustified infringement of Aboriginal title. The infringement analysis set out more fully below in the context of adverse impacts on the use of IR 37 and IR 24G, would apply equally to the interference with Aboriginal title lands.

4 Existing Boat Harbour Landfill Infringes s. 35 Rights

4.1 Overview

65. The existing Boat Harbour Landfill is an unjustified infringement on PLFN's Section 35 Aboriginal and treaty rights. The Province acknowledges that the existing landfill limits the use of IR 35 and IR 24G. The existing landfill was commissioned in 1996 without the consent of PLFN or Canada. PLFN was never compensated for the adverse impacts of the Boat Harbour Landfill on IR 37 and IR 24G. The infringement of PLFN's rights to the full use of its reserves lands is not justified under the ***Sparrow*** test. The Honour of the Crown prevents the Province from relying on the existence of the Boat Harbour Landfill as a reason to justify its continued and expanded use, so long as it continues to infringe PLFN's Section 35 rights.

4.2 Boat Harbour Landfill an Infringement

66. The Province acknowledges in the EIS that the existing Boat Harbour Landfill interferes with the use and enjoyment of IR 37 and IR 24G. From the EIS s. 6.4.2.2, at p. 6-14:

> The existing containment cell is situated between IR 37 and IR 24G as shown on Figure 1.2-1. It does result in some limitation on land use in the areas around the existing containment cell and future modern containment cell. (Emphasis added)

4.3 ***Sparrow*** *Justification Test*

67. Aboriginal rights, including Aboriginal title, are not absolute and may be infringed by government: ***Tsilhqot'in***, *supra*, at paras. 16 and 18. However, the Crown must justify the infringement using the analysis first articulated in ***Sparrow***: ***Tsilhqot'in,*** *supra*, at para. 16; ***Delgamuukw***, *supra*, at para. 160.

4.3.1 Step One - Identify Aboriginal Right

68. The first step in the ***Sparrow*** analysis is to identify the Aboriginal right alleged to be infringed. In this case, it is interference with the use and enjoyment of reserve lands caused by the restricted uses to which the land can be put as a result of the existing Boat Harbour Landfill, which precludes its use for residential purposes and other purposes.

4.3.2 Step Two - Justification Analysis - First Stage - Prima Facie Infringement

69. Once an Aboriginal right has been identified the second step is a two-stage justification analysis. The first stage of the justification analysis is to determine if a prima facie case of infringement of the identified right has been made out. This involves asking if the government action interferes with an existing Aboriginal right. From ***Sparrow***, *supra*, at para. 68:

> 68 The first question to be asked is whether the legislation in question has

> the effect of interfering with an existing aboriginal right. If it does have such an effect, it represents a prima facie infringement of s. 35(1). Parliament is not expected to act in a manner contrary to the rights and interests of aboriginals, and, indeed, may be barred from doing so by the second stage of s. 35(1) analysis.

70. Given the Province's acknowledgement that the existing Boat Harbour Landfill has had, and will continue to have, an adverse impact on IR 37 and IR 24G (see EIS s. 6.4.2.2, at p. 6-14), PLFN will have no trouble establishing a prima facie infringement.

4.3.3 Step Two - Justification Analysis - Second Stage - Justification

4.3.3.1 General

71. For this stage the onus shifts to the Crown: ***Sparrow****, supra*, para. 87. The justification stage of the analysis also has two parts. Under the first part, the government must establish a valid legislative objective. If it does, the analysis moves to the second part which examines whether, considering the trust-like nature of the relationship between the Crown and Indigenous peoples, the government has appropriately recognized and affirmed the Aboriginal or Treaty right in the decision-making process. From ***Sparrow***, *supra*, at para. 71 and 75:

> 71 If a prima facie interference is found, the analysis moves to the issue of justification. This is the test that addresses the question of what constitutes legitimate regulation of a constitutional aboriginal right. The justification analysis would proceed as follows. First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. An objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial.
>
> 75 If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here, we refer back to the guiding interpretive principle derived from *Taylor* and *Guerin*, *supra*. That is, the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.

4.3.3.2 Valid Objective

72. The first part of the justification stage involves analyzing the government objective behind the activity leading to the infringement. In the present case, the pulp mill was in operation in 1994 when the Boat Harbour Landfill was first approved and when it was commissioned in 1995.

The landfill provided a place for the storage of toxic sludge that had built up in prior years and had to be removed from that part of the Boat Harbour treatment facility known as the aerated stabilization basin ("ASB"). Removal of the build up of contaminated sediments in the ASB was a condition of the transfer of operational responsibility for the treatment facility from the Province to Scott Maritimes Limited, the owner of the pulp mill at the time. Otherwise, under the terms of a wastewater agreement between the Province and Scott Maritimes, the Province would have been obligated to operate the treatment facility for an additional 25 years had Scott Maritimes exercised its right to renew the wastewater agreement for a second term.

73. Cleaning the ASB was done to improve operational efficiency of the Boat Harbour treatment facility in removing contaminants from the mill wastewater, allowing the wastewater to meet the more stringent requirements of the new Pulp and Paper Effluent Regulations ("PPER"). Scott Maritimes would not take over operational responsibility for the treatment facility if the wastewater could not meet the new PPER requirements.

74. The purpose of cleaning the ASB was therefore to allow the Province to transfer operational responsibility to the mill owner and thereby avoid a contractual obligation to operate the treatment facility for another 25 years. The objective of the Province in building the Boat Harbour Landfill was therefore to provide a place to put the dredged contaminants from the ASB, all with the aim of avoiding future responsibility for the operation of the Boat Harbour treatment facility under the wastewater agreement.

75. A broad range of interests are capable of justifying an infringement. From ***Tsilhqot'in,*** *supra*, at para. 83:

> 83 What interests are potentially capable of justifying an incursion on Aboriginal title? In Delgamuukw, this Court, per Lamer C.J., offered this:
>
> > In the wake of Gladstone, the range of legislative objectives that can justify the infringement of [A]boriginal title is fairly broad. Most of these objectives can be traced to the reconciliation of the prior occupation of North America by [A]boriginal peoples with the assertion of Crown sovereignty, which entails the recognition that "distinctive [A]boriginal societies exist within, and are a part of, a broader social, political and economic community" (at para. 73). In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of [A]boriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis. [Emphasis added; emphasis in original deleted; para 165]

76. However, in ***Sparrow***, *supra*, at paras. 71-72, the SCC found that the general goal of being "in the public interest" was too vague an objective and was neither compelling nor substantial:

> 71 If a prima facie interference is found, the analysis moves to the issue of justification. This is the test that addresses the question of what constitutes legitimate regulation of a constitutional aboriginal right. The justification analysis would proceed as follows. First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. An objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial.
>
> 72 The Court of Appeal below held, at p. 331, that regulations could be valid if reasonably justified as "necessary for the proper management and conservation of the resource *or in the public interest*" (emphasis added). We find the "public interest" justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights.

77. In the present case, it appears that the object of the Boat Harbour Landfill was to avoid Provincial liability under the wastewater agreement. Operationally, the treatment facility would remain the same. Avoiding legal responsibility comes down to avoiding paying damages. Saving money seems to be a weak objective when it comes to justifying an infringement of an Aboriginal right. It seems to fit in the same category as the general notion of "the public interest" and such a justification seems equally vague.

78. Moreover, to meet the justification test, the government objective must be sufficiently compelling and substantial to justify interference with an Aboriginal or treaty right, and whether it is compelling and substantial rests on whether it furthers the goal of reconciliation, considering the Indigenous perspective as well as the perspective of the general public. See ***Tsilhqot'in***, *supra*, at paras. 81-82:

> 81 I agree with the Court of Appeal that the compelling and substantial objective of the government must be considered from the Aboriginal perspective as well as from the perspective of the broader public. As stated in *Gladstone*, at para. 72:
>
> > [T]he objectives which can be said to be compelling and substantial will be those directed at either the recognition of the prior occupation of North America by [A]boriginal peoples or — and at the level of justification it is this purpose which may well be most relevant — at the reconciliation of [A]boriginal prior occupation with the assertion

> of the sovereignty of the Crown. [Emphasis added by SCC]
>
> 82 As *Delgamuukw* explains, the process of reconciling Aboriginal interests with the broader interests of society as a whole is the *raison d'être* of the principle of justification. Aboriginals and non-Aboriginals are "all here to stay" and must of necessity move forward in a process of reconciliation (para. 186). To constitute a compelling and substantial objective, the broader public goal asserted by the government must further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective.

79. The onus will be on the Province to explain what the objective was when the Boat Harbour Landfill was built, how it took into account PLFN's perspective, and how it furthered the goal of reconciliation. PLFN maintains that the construction of the Boat Harbour Landfill did nothing to accommodate its interests and in fact, as noted above, had the effect of further limiting the use and enjoyment of its reserve lands on IR 37 and IR 24G while prolonging the use of the Boat Harbour treatment facility. If, as suggested above, the decision to create and use the Boat Harbour Landfill to store hazardous waste from the ASB was simply to avoid responsibility for operating the treatment facility for another 25 years, the objective will not be sufficiently compelling or substantial enough to justify an infringement, and the justification analysis will end there.

4.3.3.3 Reconciliation

80. Assuming that a valid objective is found, the justification inquiry moves to the second part which considers whether the government has properly reconciled the rights of the Indigenous community with the honour of the Crown.

81. The principles applicable on second part of the justification test were recently summarized by Kent, J. in ***Thomas***, *supra*, at para. 591:

> 591 Having found that the continued presence and operation of the Kenney Dam and related reservoir infringes the plaintiffs' Aboriginal right to fish, the next question is whether such infringement is justified. Earlier in these reasons, I summarized the concept of justified infringement articulated in ***Sparrow*** and ***Tsilhqot'in***:
>
> …
>
> • Justification also requires that the Crown has (1) discharged its procedural duty to consult and accommodate Aboriginal interests to the degree required by the circumstances; and, (2) otherwise satisfied its duty to act honourably, including compliance with any fiduciary duty arising from assumed discretionary control of specific Aboriginal interests.

> • Justification requires that any infringement of Aboriginal interests be necessary and rationally connected to the objective, as minimally intrusive as possible, and also properly proportionate in the sense that the perceived benefits are not outweighed by adverse effects on the Aboriginal interest.

82. Kent, J. in ***Thomas***, *supra*, at para. 601, found that the goal of maximizing capacity for an aluminum smelter did not outweigh the adverse impacts on Aboriginal fishing rights and did not meet the justification test:

> 601 If I was compelled to decide the matter, I would likely determine that RTA's desire to operate at maximum capacity does not outweigh the resulting adverse effects on the plaintiffs' Aboriginal interests and that the latter infringement is no longer justified. I would first emphasize, however, that a good-faith process of consultation and accommodation with the plaintiffs about their concerns might well lead to a resolution acceptable to all parties. The courts have stated many times that such negotiated outcomes are the preferable approach to such disputes.

83. Various factors are taken into account on this part of the justification test depending on the circumstances.

84. The Supreme Court of Canada in ***Sparrow*** noted that one of the factors that may need to be considered under the second part of the justification test is whether fair compensation is available in an expropriation case: ***Sparrow***, *supra*, at para. 82.

85. Justification must be considered in light of the Honour of the Crown, recognizing the unique non-adversarial relationship between the Crown and Indigenous peoples: ***Sparrow***, *supra*, at para. 71-79; ***R. v. Badger***, 1996 CarswellAlta 587, at para. 41 (per Cory J.); ***Delgamuukw***, *supra*, at para. 160-169.

86. In some cases, Aboriginal rights must be prioritized over others. For example, in ***Sparrow***, the Supreme Court of Canada held that to meet the second part of the justification test, a fisheries conservation scheme would have to give priority to the Aboriginal food fishery after the interests of conservation were met. Only this would be consistent with the protection of the Aboriginal right at stake and uphold the Honour of the Crown. From ***Sparrow***, *supra*, at para. 78:

> 78 The constitutional nature of the Musqueam food fishing rights means that any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing. If the objective pertained to conservation, the conservation plan would be scrutinized to assess priorities. While the detailed allocation of maritime resources is a task that must be left to those having expertise in the area, the Indians' food requirements must be met first when that allocation is established. The significance of giving the aboriginal right to fish for food top priority can be described as follows. If, in a

> given year, conservation needs required a reduction in the number of fish to be caught such that the number equalled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right. If, more realistically, there were still fish after the Indian food requirements were met, then the brunt of conservation measures would be borne by the practices of sport fishing and commercial fishing.

87. The justification analysis also takes account of the nature of the Crown's fiduciary duty and the nature of Aboriginal title. See ***Delgamuukw***, *supra*, at para. 165:

> 166 The manner in which the fiduciary duty operates with respect to the second stage of the justification test — both with respect to the standard of scrutiny and the particular form that the fiduciary duty will take — will be a function of the nature of aboriginal title. Three aspects of aboriginal title are relevant here. First, aboriginal title encompasses the right to *exclusive* use and occupation of land; second, aboriginal title encompasses *the right to choose* to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples; and third, that lands held pursuant to aboriginal title have an inescapable *economic component*.

88. One aspect of Aboriginal title that is important in this context is the limitation placed on the use of Aboriginal title land, and by extension reserve land, by the very nature of Aboriginal title itself. As noted above, Aboriginal title land is subject to the restriction that it cannot be used in a manner which is inconsistent with the relationship of the Aboriginal peoples to the land; in the sense that no activity will be permitted which is akin to equitable waste and which would interfere with the enjoyment of Aboriginal title lands by future generations. From ***Tsilhqot'in,*** *supra*, at paras. 84-86:

> 84 If a compelling and substantial public purpose is established, the government must go on to show that the proposed incursion on the Aboriginal right is consistent with the Crown's fiduciary duty towards Aboriginal people.
>
> 85 The Crown's fiduciary duty in the context of justification merits further discussion. The Crown's underlying title in the land is held for the benefit of the Aboriginal group and constrained by the Crown's fiduciary or trust obligation to the group. This impacts the justification process in two ways.
>
> 86 First, the Crown's fiduciary duty means that the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations. The beneficial interest in the land held by the Aboriginal group vests communally in the title-holding group. This means that incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land.

89. The list of factors taken into account on the justification test is not exhaustive. At the heart of the justification analysis is whether the Crown has respected Aboriginal rights. See ***Sparrow***, *supra*, at para. 83:

> 83 We would not wish to set out an exhaustive list of the factors to be considered in the assessment of justification. Suffice it to say that recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and, indeed, all Canadians.

90. Applying the following factors to the Boat Harbour Landfill leads to the conclusion that the infringement was, and is, not justified.

4.3.3.3.1 Factor #1 - Nature of PLFN's Interest in its Reserve Lands

91. The existing Boat Harbour Landfill impacts the use and enjoyment of reserve lands. These impacts have continued since 1996 when the landfill became operational. This has resulted in a substantial deprivation of the benefit of IR 37 and IR 24G by future generations. This alone causes the existing Boat Harbour Landfill to fail the justification test: ***Tsilhqot'in***, *supra*, at paras. 84-86. Because of their status as reserve lands, nothing can justify the permanent restrictions on the use of IR 37 or IR 24G by future generations. The same would apply to PLFN's interest in the Aboriginal title lands on which the Boat Harbour Landfill is situated, if such title is proven.

4.3.3.3.2 Factor #2 - Minimal Impact

92. Other options were available to the Province for the disposal of the toxic sludge from the ASB at Boat Harbour which would not have had any impact on IR 37 or IR 24G. Specifically, the Province could have built a landfall on other Crown lands nearby and trucked the contaminated material there. Had the same approval process been in place for another site, there is little doubt that another site would have been approved. There were plenty of Crown lands in the area near Boat Harbour. The Province did not even consider other locations.

4.3.3.3.3 Factor #3 - Proportionality

93. The actual benefits to the Province from transferring responsibility for the Boat Harbour treatment facility are not fully known to PLFN, so it is difficult to assess whether the infringement caused by the existing Boat Harbour Landfill was proportional to the benefit. The onus is on the Province to establish this.

94. One of the benefits was likely the savings the Province realized by transferring operation of the Boat Harbour treatment facility to Scott Maritimes. The transfer was effected through a memorandum of understanding and a lease of the Boat Harbour treatment facility lands to Scott Maritimes. The lease was originally for a term of 10 years from January 1, 1996 to December 31, 2005. However, the Province extended the lease in 2002 to December 31, 2030, notwithstanding

earlier commitments to PLFN to close and remediate Boat Harbour.

95. PLFN did not oppose the original 10-year term on the understanding that the treatment facility would be permanently closed after the lease expired. It did not oppose the extension of the lease to 2030 on the condition that new mill owner Kimberly Clark would build a bypass pipeline through Boat Harbour by December 31, 2005 that would have allowed the stabilization basin to be remediated and returned to tidal in 2006.

96. The bypass pipeline was not installed by the end of 2005 because it was not feasible. PLFN did not oppose the continued use of Boat Harbour for 3 more years on the understanding that an alternative to the bypass pipeline would be achieved.

97. At the end of 2008, when no alternatives had been identified, PLFN insisted that the Province proceed with the closure of the treatment facility and the remediation of Boat Harbour as promised. The Province initially agreed to do so, but later refused, leading to a lawsuit by PLFN in 2010, which is still before the Court. Finally in 2014, as discussed more fully below, the Province committed to close the treatment facility which it did on January 31, 2020.

4.3.3.3.4 Factor #4 - Consultation and Accommodation

98. Consultation on the construction of the Boat Harbour Landfill was minimal. The Province advised PLFN that it was going to construct the landfill at one or more meetings of the Boat Harbour Negotiation Committee. That committee was set up to plan for the closure of the Boat Harbour treatment facility and subsequent remediation of Boat Harbour, as the Province had committed to in 1991.

99. How much information was provided is not clear. It was clearly insufficient since the record shows that representatives of both PLFN and Canada were shocked at the scale of the landfill once construction began (Document Brief, Tab76).

100. Neither Canada nor PLFN were ware of, nor involved in, any environmental assessment process, if one occurred at all.

101. As discussed in more detail below, when reserve lands are affected, the duty to consult is at the higher end of the scale and will require the consent. Further, where established Aboriginal interests are affected, consent may be required if the infringement is serious and leads to irreparable damage: ***Haida Nation****, supra*, at para. 48.

102. PLFN did not consent to the construction of the Boat Harbour Landfill. In fact, as noted above, PLFN could not consent to such long-term adverse impacts on its reserve lands because of the communal nature of its right in reserve lands, which are intended to benefit future generations as well as present members.

4.3.3.3.5 Factor #5 - Compensation

103. PLFN has never been compensated for the adverse impacts of the Boat Harbour Landfill on IR 37 and IR 24G.

4.4 Conclusion re Infringement

104. In summary, the existing Boat Harbour Landfill is an unjustified infringement of PLFN's rights to the use and enjoyment of IR 37 and IR 24G. The Province's objective in building the landfill was not sufficiently compelling and substantial to justify the infringement. The landfill does not meet the first part of the ***Sparrow*** test. Even if the Province could establish a valid objective, the landfill fails the second part of the justification test because it does not further the goals of reconciliation or consider PLFN's perspective. The landfill does not minimally impair PLFN's rights as it could have bene placed elsewhere with no impact. The general benefit to the Province from placing the landfill at Boat Harbour was not proportionate to the long-term interference with PLFN's use and enjoyment of its reserve lands. While minimal consultation took place, it was insufficient and there was no accommodation of PLFN's rights. Nor was consent obtained or compensation ever paid. The longstanding existence of the Boat Harbour Landfill cannot now be used to justify the long-term storage contaminants from Boat Harbour. It has always infringed PLFN's Section 35 rights and should not be considered for long term storage of even more hazardous waste.

5 Province Failed to Negotiate Remediation Agreement as Promised

5.1 Overview

105. The Agreement in Principle of June 16, 2014 is an accommodation agreement flowing from the Province's duty to consult and accommodate PLFN under Section 35. The Agreement in Principle imposes a constitutional obligation on the Province to negotiate in good faith the terms of an agreement with PLFN governing the remediation of Boat Harbour. No negotiation toward a remediation agreement has ever taken place. Instead, the Province has unilaterally opted to use the existing Boat Harbour Landfill to store contaminants from Boat Harbour without the consent of PLFN, even though PLFN opposes it. While the Province has made considerable efforts to explain the reasons for its decision to do so, moving ahead without attempting to negotiate a remediation agreement is a breach of the Agreement in Principle and is inconsistent with the Province's constitutional duty to act honourably in its dealings with PLFN. Considering the Province's breach of the Agreement in Principle, the proposed use of the Boat Harbour Landfill cannot be considered or condoned for the long-term storage of hazardous waste.

5.2 2014 Agreement in Principle

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

107. 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 the Agreement in Principle on June 16, 2014 (Document Brief, Tab 169, para. 52 and 53, Tab 253, para. 28, Tab 262, para. 162, Tab 247).

108. 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 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.

5.3 s. 35 Accommodation Agreement

109. In proceedings between the Province and PLFN in ***Nova Scotia (Aboriginal Affairs) v. Pictou Landing First Nation***, 2019 NSCA 75, at paras. 1, 2 and 162, the Nova Scotia Court of Appeal referred to the fixing of a closure date for the Boat Harbour treatment facility in the ***Boat Harbour Act***, as promised in the Agreement in Principle, as "a partial accommodation by the Crown to PLFN". By the same logic, the commitment to negotiate a remediation agreement as set out in the Agreement in Principle must also be "a partial accommodation by the Crown to PLFN".

110. As discussed more fully below, the duty to consult and accommodate arises under Section 35 of the ***Constitution Act, 1982***, which recognizes and affirms existing Aboriginal and treaty rights. It is a constitutional duty giving rise to constitutional rights.

111. An agreement respecting accommodation mandated by Section 35 gives rise to constitutionally recognized Aboriginal rights. In fact, any change to agreed upon accommodation measures triggers a new duty to consult and accommodate under Section 35 with respect to the proposed change to the accommodation measures already agreed upon: ***Nunatsiavut v. Canada (Department of Fisheries and Oceans)***, 2015 FC 492, at para. 344.

5.4 Province has not Negotiated in Good Faith

112. Despite the commitment to do so in the Agreement in Principle and the terms of reference of the committee formed following the Agreement in Principle (the "Boat Harbour Committee") (see EIS, Appendix I, p. 8), the Province has not engaged in good faith negotiations with PLFN towards an agreement governing the Boat Harbour remediation.

113. This is consistent with the Province's approach regarding the date for closing the Boat Harbour treatment facility. The Province initially entered into negotiations with PLFN on a closure date, but when no agreement was reached, the Province unilaterally chose a date and introduced Bill 89, the ***Boat Harbour Act***, which received Royal Assent on May 11, 2015 (Document Brief, 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.

114. With respect to a remediation agreement, the Province never put forward a draft remediation agreement or engaged in discussions of the possible terms of a remediation agreement. PLFN put forward the position that a joint project committee be established with an equality of voting rights as between PLFN and the Province to govern the remediation project. The Province rejected this approach.

115. Instead of negotiating a remediation agreement, the Province has chosen to "engage" with PLFN representatives and members outside of a formal negotiation or consultation process and to make unilateral decisions concerning the remediation project on a piecemeal basis.

116. The most significant unilateral decisions to date are the decision not to include the removal and clean up the existing Boat Harbour Landfill in the Project and the decision to instead expand the existing landfill with the intent of permanently placing contaminants to be dredged from Boat Harbour in it.

5.5 Failure to Negotiate Agreement a Breach of the Crown's Duty to Act Honourably

117. The Crown has a constitutional duty under Section 35 to honour its commitments to Indigenous peoples. The Honour of the Crown is engaged in the interpretation and

implementation of more than just treaties, and is also engaged vis-à-vis agreements which are meant to resolve disputes over Treaty or Aboriginal rights: ***Muskoday First Nation v. Saskatchewan***, 2016 SKQB 73, at paras. 37-39; ***George Gordon First Nation v. R.***, 2020 SKQB 90, at para. 93; ***Manitoba Metis Federation Inc v. Brian Pallister et al.***, 2021 MBCA 47, at paras. 22, 23, 57. This would include accommodation agreements.

118. As noted above, once agreed upon, any changes to accommodation measures trigger a new duty to consult and accommodate with respect to proposed changes to the accommodation measures already in place: ***Nunatsiavut v. Canada (Department of Fisheries and Oceans)***, *supra*, at para. 344.

119. The Province has not initiated any consultation regarding changes to the Agreement in Principle. PLFN has not agreed to any such changes or waived its rights under the Agreement in Principle. The Crown has a duty to honour the Agreement in Principle. Moreover, the Province cannot contract out of its duty of honourable dealing. From ***Beckman v. Little Salmon/Carmacks First Nation***, *supra*, at para. 61:

> I think this argument is unpersuasive. The duty to consult is treated in the jurisprudence as a means (in appropriate circumstances) of upholding the honour of the Crown. Consultation can be shaped by agreement of the parties, but the Crown cannot contract out of its duty of honourable dealing with Aboriginal people. As held in *Haida Nation* and affirmed in *Mikisew Cree*, it is a doctrine that applies independently of the expressed or implied intention of the parties.

120. The Province therefore had a duty to comply with the accommodation measures set out in the Agreement in Principle, including the obligation to negotiate with PLFN in good faith towards an agreement governing the remediation of Boat Harbour. It has not done so. PLFN intends to ensure compliance with the Agreement in Principle going forward.

5.6 Conclusion re Lack of Remediation Agreement

121. The Agreement in Principle gave rise to Section 35 rights. The Province has not attempted in good faith to reach an agreement on remediation with PLFN as it agreed to do in the Agreement in Principle. This is inconsistent with the Province's duty to act honourably in its dealings with PLFN. Instead, it has put forward the Project which contemplates the use of the Boat Harbour Landfill for long-term storage of hazardous waste, which PLFN opposes. An option put forward in breach of an accommodation agreement and in breach of the Crown's duty to act honourably cannot be considered and the Province should be encouraged to fulfil its obligations by negotiating with PLFN towards a remediation agreement as it promised to do 8 years ago.

6 Consultation Inadequate prior to Cabinet Decision

6.1 Overview

122. The Province did not adequately consulted with PLFN on the use of the existing Boat Harbour Landfill for the long-term storage of hazardous waste before making a decision to do so. Consultation was minimal. The Province did not give PLFN an adequate opportunity to make submissions and present evidence on the use of the Boat Harbour Landfill. It had already made up its mind that the existing landfill would be used in the Project. Later, the province failed to consult with PLFN before deciding to add more than 81,000 m^3 of additional hazardous waste from the ASB to the Boat Harbour Landfill when it released Northern Pulp from its obligation to remove the waste from the ASB and dispose of it in Northern Pulp's landfill. A proposal put forward in breach of the duty to consult should not be considered.

6.2 Principles governing the Duty to Consult

123. Section 35 requires the Crown to consult with Indigenous people whenever the Crown contemplates an activity or a decision that may adversely impact an Aboriginal or Treaty right whether established or claimed.

124. The duty to consult flows from the Honour of the Crown and applies even when Aboriginal claims and interests are uncertain or in dispute: ***Haida Nation***, *supra*, at para. 35. From ***Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)***, 2004 SCC 74, at para. 24:

> The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the ***Constitution Act, 1982***, which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1).

125. The trigger for the duty to consult is low: ***Mikisew Cree****, supra,* at para. 34. However, the scope of consultation will vary depending on the strength of the claimed rights and the degree of harm posed by the potential adverse impacts on those rights: ***Haida Nation***, *supra*, at para. 39. From ***Delgamuukw***, *supra*, at para. 168.

> There is always a duty of consultation. . . . The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable

> standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

126. The duty to consult promotes negotiation before any infringement of a right has taken place: Richard F. Devlin & Ronalda Murphy*, "Contextualizing the Duty to Consult: Clarification or Transformation?"* (2003) 14 ***Nat'l J. Const. L.*** 167 at 214.

127. Consultation after a decision is made is inadequate: ***Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)***, 2005 CarswellBC 472 BCCA, at para. 95. From ***Musqueam***, *supra*, at para. 95:

> The Musqueam should have had the benefit of an earlier consultation process as opposed to a series of counter-offers following the decision by LWBC to proceed with the sale.

128. The duty to consult considers the process by which the infringing activity is planned and whether that process is compatible with the Honour of the Crown: ***Mikisew Cree***, *supra*, at para. 59.

129. Consultation seeks to avoid the government indifference and lack of respect that impedes reconciliation: ***Beckman v. Little Salmon/Carmacks First Nation***, 2010 SCC 53, at para. 55.

130. While there is no duty on the Crown to reach an agreement with an Aboriginal people over an intended government action, the Crown must be willing to make changes to its proposal in light of information that it receives during the consultation: ***Taku River***, *supra*, at para. 29.

131. Where established Aboriginal rights are affected, consent of the Aboriginal group may be required if the infringement is serious and leads to irreparable damage: ***Haida Nation****, supra*, at para. 48.

132. The duty to consult rests with the government alone and cannot be delegated to third parties, although some procedural aspects may be delegated: ***Haida Nation***, *supra*, at para. 52.

133. The Crown may choose to carry out some of the required consultation within an environmental assessment process, but the Crown must advise the Indigenous group involved that it intends to do so and provide a meaningful opportunity for the group to address concerns about the proposed process: ***Clyde River***, *supra*, at para. 27.

6.3 Extent of Consultation

134. While the Province has "engaged" extensively with PLFN in respect of the remediation of Boat Harbour, it has chosen to do so outside the formal on-the-record consultation process under the ***Terms of Reference for a Mi'kmaq/Nova Scotia/Canada Consultation Process*** ("TOR") (Document Brief, Tab 174).

135. The limited extent of formal consultation can be seen from the consultation record set out in Appendix J of the Province's EIS.

136. The Province initiated formal consultation on April 18, 2018 (EIS, Appendix J, p. 36).

137. The following day, on April 19, 2018, the first and only consultation meeting took place prior to the Cabinet's decision on the use of the Boat Harbour Landfill for long term storage of contaminants from the Project. At that time a document entitled *Summary of the Remedial Options Decision Document* (EIS, Appendix J, p. 56) was presented to PLFN summarizing the remediation options the Province's consultants, GHD, had considered (the "*Remedial Options Summary*").

138. The document summarized a lengthier report prepared much earlier by GHD for the Province entitled *Design Requirements Document for the Boat Harbour Remediation Planning and Design ("Design Requirements Document")* and dated September 12, 2017.

139. The record from the April 19, 2018 consultation meeting (Document Brief, Tab 273) shows that PLFN raised concerns about the proposal to use the existing Boat Harbour Landfill for the permanent storage of hazardous waste from Boat Harbour as set out in the *Remedial Options Summary*. The Province advised that no decision had yet been made on the use of the Boat Harbour Landfill and other options were still being considered. The relevant portion of the minutes are reproduced here for convenience:

> **Waste Management Component**
>
> - 1,224,000m^3 in place, after dewatering, 517,000m^3.
> - Two options: onsite disposal or offsite disposal.
> - Onsite would mean storing in existing cell that is approved to take it. It would be capped similarly to the Tar Ponds site in Sydney.
> - Offsite disposal has challenges as there is currently no approved disposal facility that is approved to accept it.
> - PLFN asked if there are currently any issues with the Tar Ponds site. GHD answered that there isn't.
> - PLFN feels that they communicated to their community members that at the end of remediation, everything would be gone. Storing waste onsite goes against that message.
> - PLFN asked when it would be known if the waste can go offsite. GHD answered that they are working with NSE to see if there are options.
> - PLFN expressed that NPNS should take the sludge back to their site. PLFN indicated that a new storage cell should be built with the new ETF so the sludge can be stored on the NP site.

- PLFN is concerned that the closure dates could be compromised and feels that community members will not accept capping onsite.
- PLFN asked what the implications are of not being ready to remediate at January 31, 2020. Can BH stop taking effluent on that date even if remediation approach is not yet finalized? NS Lands answered that yes, that it okay, effluent not flowing can be managed until the remediation starts.

Next Steps, Concluding Remarks, and Wrap-Up

- PLFN (Assembly) has 30 days to respond to consultation initiation letter.
- NS Lands to distribute Design Requirements Document to PLFN.
- NSE and GHD to work together to determine if offsite disposal is a viable option for waste management.
- NS Lands to follow up and determine what Northern Pulp is approved for disposing/ what kind of waste Northern Pulps landfill is currently accepting.

140. The more detailed *Design Requirements Document* was provided to PLFN on the following day, April 20, 2018.

141. On May 28, 2018, PLFN wrote to the Province setting out its preliminary comments on the information provided to PLFN (EIS, Appendix J, p. 116).

142. In its response, PLFN noted that its comments were preliminary as PLFN intended to consult with its own experts further on the matter and locate further historical documents relevant to the issue.

143. PLFN echoed the concerns raised at the April 19, 2018 consultation meeting: "Chief and Council are strongly opposed to any contamination being left at or near Boat Harbour. They are prepared to wait on the approval of another containment facility rather than proceed with a long term containment cell at Boat Harbour."

144. PLFN advised the Province of PLFN's longstanding expectation that the entire area around Boat Harbour would be remediated, and the lands turned over to PLFN:

> The other aspect of this is that as far back as 1997 the Province had assured Pictou Landing First Nation that once remediation was complete all lands in and around Boat Harbour would be turned over to the community. I enclose two pieces of correspondence which are readily at hand and which document some of the discussion around land at the time. Further work will be required to uncover the full dealings between Pictou Landing First Nation and the Province in respect of the transfer of these lands to Pictou Landing First Nation. Suffice to say that is the community's long held expectation (and potentially an enforceable right) to have all lands around Boat Harbour cleaned up and returned to the community once the treatment facility was closed.

145. The Province responded on August 23, 2018 (EIS, Appendix J, p. 121). The Province indicated that the letter contained its preliminary response to PLFN's preliminary comments. The Province advised PLFN that on August 9, 2018, a presentation had been made to the Nova Scotia Executive Council and a decision was made that the Project would incorporate the use of the existing Boat Harbour Landfill. The letter concludes with an affirmation that the Province will continue to listen to PLFN and looks forward to continued consultation.

146. No further formal consultation has taken place since then, outside the current environmental assessment process.

147. In the context of the duty to consult, the distinction between formal consultation and informal "engagement" is important. PLFN's legal counsel was not involved in the informal engagement events except on rare occasions. On the other hand, PLFN's counsel was involved in all aspects of the formal consultation process because of its legal significance. PLFN received no notice that the Province intended to rely on informal engagement as part of the formal consultation process. The Province consultation record supports this (EIS, Appendix J).

6.4 Opportunity to Make Submissions and Present Evidence

148. PLFN was unaware that on August 9, 2018 the Provincial Cabinet was deciding whether to include the existing Boat Harbour Landfill in the Project.

149. In its preliminary submissions, PLFN indicated that a full review of the historical record was needed to uncover the past dealings between the Province and PLFN in respect of the existing landfill and the remediation of Boat Harbour (EIS, Appendix J, p. 116).

150. The Document Brief accompanying these submissions confirms the extent of material relevant to the issue and the complexity of the matter. Discussions and agreements relating to the remediation of Boat Harbour and the lands around Boat Harbour have been going on since 1991. Correspondence between the Province's lawyer, Greg Evans, and PLFN lawyer, Tony Ross, demonstrates that as early as July 7, 1995 PLFN was seeking the remediation of the Boat Harbour Landfill and the Province had agreed to it (Document Brief, Tab 83, p. 4):

> 10. That the Province will confirm that the settling ponds and the landfill sites will be remediated and the sludge press structure will be removed so that with the opening up of the aeration chamber and Boat Harbour, tidal flows will, as closely as possible, conform to that which existed before manmade structures were imposed on Boat Harbour.
>
> **Rehabilitation of Settling Ponds and Landfill**
>
> **Yes.**

151. PLFN was not given an opportunity to fully respond to the proposal to use the Boat Harbour Landfill before the decision was made on August 9, 2018. It is unlikely that any of the historical information was provided to Cabinet given how voluminous it is.

152. The Province's EIS includes few details of the historical dealings between PLFN and the Province surrounding the remediation of Boat Harbour and the Boat Harbour Landfill. This is surprising given the planning for the remediation of Boat Harbour has been ongoing almost continuously for 33 years and during that time many representations were made by the province. This is especially so given that PLFN had characterized this information as important and the Province had access to the historical record.

153. PLFN had understood from the consultation meeting of April 19, 2018, that other options were still under investigation at that time and was not advised otherwise before August 9, 2018. This was obviously not the case.

154. PLFN has repeatedly, both before and after August 9, 2018, voiced its objection to the use of the Boat Harbour Landfill. Two community referendums have overwhelmingly supported this position. Since learning of Cabinet's decision in August 2018, PLFN has attempted to address its concerns with the Province and has certainly made them known in the within environmental assessment process. The Province has not budged.

6.5 Province had Decided before Consultation

155. The *Design Requirements Document* and *Remedial Options Summary* based upon it were prepared before any formal consultation with PLFN took place. The implication is that the Province had already decided upon the solution and was not open to change based on PLFN's perspective. Its subsequent approach is consistent with that assumption.

156. This evidences an unwillingness to consider PLFN's position and adapt the project accordingly, a breach of the duty to consult.

6.6 Northern Pulp's Sludge

157. On January 29, 2020, on the eve of the closure of the Boat Harbour treatment facility, the Province issued a ministerial order under the Nova Scotia ***Environment Act*** requiring, among other things, that Northern Pulp prepare a plan for decommissioning the treatment facility to include the removal of contaminated sludge from the ASB (Document Brief, Tab 266).

158. Northern Pulp was required to reduce the sludge in the ASB to 1995 levels, as provided for in a 1995 memorandum of understanding between the Province and Scott Maritimes (Document Brief, Tab 95, section 4.01(f)).

159. Northern Pulp was also to dispose of the sludge from the ASB in its own industrial landfill located near the mill (Document Brief, Tab 271, para. 29). Nova Scotia and the Province had agreed to 81,375 m^3 as the volume of sludge to be removed from the ASB by Northern Pulp to

achieve 1995 levels (Document Brief, Tab 271, para. 30).

160. However, on March 22, 2021, the Province and Northern Pulp agreed that the Province would take over responsibility for the removal of all contaminated sludge in the ASB, the sludge which Northern Pulp was obligated to remove (Document Brief, Tab 271, para. 30; Tab 270, p. 8).

161. PLFN was not consulted on this decision even though it meant adding even more sludge to the existing Boat Harbour Landfill despite the fact that the Northern Pulp landfill meets all of NS Environment's criteria for hazardous waste landfills and the Boat Harbour Landfill site does not (see below).

6.7 Conclusion re Consultation

162. The Province has not met its duty to consult with respect to its August 9, 2018 decision to use of the existing Boat Harbour Landfill for the long term storage of Boat Harbour contaminants. The decision to use the Boat Harbour Landfill in the remediation project was made in breach of the Province's duty to consult.

7 Proposed Accommodation/Compensation Inadequate

7.1 Overview

163. The Province suggests that it is transferring 173 hectares of land as partial accommodation for the continuing impacts of the Boat Harbour Landfill on PLFN. However, PLFN has never agreed to the transfer of lands as accommodation or compensation for the adverse impacts of the Boat Harbour Landfill. Of the 173 hectares that the Province says it is transferring as compensation for the future impacts it acknowledges will arise from the continued use of the Boat Harbour Landfill, 128 hectares had already been promised to PLFN as early as 1991 as consideration for PLFN not taking any legal action to interfere with the continued use of the Boat Harbour treatment facility, as discussed more fully in the Document Brief. PLFN lived up to its end of the bargain. As a result, the Province has a pre-existing legal obligation to transfer those lands and cannot characterize those 128 hectares as an accommodation for the continued adverse impacts of the Boat Harbour Landfill.

164. PLFN has not agreed to any amount of compensation for the proposed interference with the use and enjoyment of IR 37 and IR 24G. Compensation for adverse impacts on reserve lands should be negotiated in accordance with the principles set out in ***Southwind v. Canada***. This requires obtaining PLFN consent. Negotiated compensation would reflect both the value of the Boat Harbour Landfill to the remediation Project and PLFN's own views on the inherent value of its impacted reserve lands. Such negotiations have not taken place and the Project should not be approved unless and until PLFN consent is obtained.

7.2 Proposed Accommodation

165. In the EIS, the Province acknowledges that 128 of the 173 hectares it proposes to transfer to PLFN had already been committed to PLFN by Provincial Order in Council #96-621 dated August 14, 1996, and only 45 hectares are newly identified lands (EIS, p. 6-10).

166. Even this does not fully capture the history of the land promises relating to Boat Harbour. The 128 hectares were first promised to PLFN in 1991 to induce PLFN not to sue the Province or the mill owner over the use of Boat Harbour as a treatment facility to the end of 1995 (Document Brief, Tab 36). The same lands were later promised again in exchange for PLFN's forbearance from taking legal action against the Boat Harbour treatment facility to the end of 2005 (Document Brief, Tab 86).

167. PLFN takes the position that because it did forbear from taking any action against the Province or the mill owners, to its detriment, the Provincial commitment to transfer the land is binding and gives rise to an equitable interest in the lands on the part of PLFN. The Province cannot now characterize these lands as being transferred as partial accommodation for the adverse impacts of the remediation project and the Boat Harbour Landfill on PLFN's reserve lands.

168. As such only 45 hectares of land intended to be conveyed by the Province can be considered as an accommodation relating to the future use of the Boat Harbour Landfill.

169. PLFN has never agreed to accept the transfer of any lands as an accommodation or as compensation for the continuing impacts of the Project on IR 37 and IR 24G or otherwise.

*7.3 **Southwind** Compensation Principles*

170. In ***Southwind v. Canada***, *supra*, at para. 110, the Supreme Court of Canada held that compensation for taking an interest in reserve lands should not be based on highest and best use under expropriation law principles, but rather on the value of the land to the project and the value of the land lost as determined by the Indigenous community involved. This is best determined through negotiation between the community and the proponent aimed at securing the community's consent (***Southwind***, at para. 110).

171. In ***Southwind***, the SCC pointed to other instances where Canada had correctly negotiated compensation on behalf of other Indigenous communities whose lands needed to be flooded for a hydro-electric project. In those cases, Canada had demanded compensation equal to as much as 64 times the fair market value of the land (***Southwind***, *supra*, at para. 136).

172. In the present case, no negotiation has taken place. The Province has assumed it has the right to continue to use the Boat Harbour Landfill in perpetuity without PLFN's consent. The true cost of the Boat Harbour Landfill, and thus its feasibility, will not be known until negotiations have concluded with PLFN's consent, if such consent can be achieved.

8 Other Lands Available for Landfill

8.1 Overview

173. There are 109 parcels of Crown land and 97 parcels of private land within a 50 km radius of Boat Harbour that may make a suitable site for a landfill based on a desktop review of location and site characteristics. Of these, 15 parcels are within 10 km of Boat Harbour. Another suitable location is the existing landfill owned by Northern Pulp on the mill site. Northern Pulp has expressed a willingness to explore this option.

8.2 Crown Lands

174. PLFN asked Hive Engineering to identify parcels of Crown land near Boat Harbour that may be suitable for a hazardous waste landfill. In a report to PLFN dated August 4, 2023 which was provided to IAAC on August 24, 2023 (the "Hive Report"), Hive Engineering identified 109 parcels of land within 50 kilometers of Boat Harbour that were large enough and free of any streams, rivers, lakes, wetlands, old growth forests and protected areas such as parks, nature reserves, significant species and habitats, and potable water wells. Of these, 3 parcels were within 10 km of Boat Harbour (Hive Report, p. 9).

8.3 Private Lands

175. PLFN also asked Hive Engineering to identify parcels of private land within a 50 km radius of Boat Harbour which might be suitable for a landfill. Hive Engineering identified 97 parcels that meet the desktop search criteria (Hive Report, p. 10). Of these, 12 were within 10 km of Boat Harbour.

8.4 Northern Pulp Landfill

176. Northern Pulp operates a landfill near its mill at Abercrombie Point. It has in the past placed dredged material from the Boat Harbour treatment facility into its landfill. In discussions with PLFN, representatives of Northern Pulp have expressed an openness to explore the potential use of its landfill for long-term storage of the hazardous waste from Boat Harbour.

177. Hive Engineering was also asked by PLFN to apply the environmental site criteria NS Environment developed for the Alternative Site Assessment to the Northern Pulp landfill site. As discussed in more detail below, the Hive Report concluded that the Northern Pulp site meets all the siting criteria (Hive Report, p. 16) making it the preferred location over the Boat Harbour Landfill site.

8.5 Conclusion

178. The Honour of the Crown requires the Province to examine other less intrusive locations for the landfill. It has not done so. It would take relatively little effort to assess the sites identified by Hive Engineering.

9 Boat Harbour Landfill does not meet NS Environment Siting Criteria for a Hazardous Waste Landfill

9.1 Overview

179. Using the criteria for siting hazardous waste landfills developed by NS Environment as set out in the Province's Alternative Site Assessment, Hive Engineering analysed the Boat Harbour Landfill site and the Northern Pulp landfill site (Hive Report, pp. 10-16). The result was that the Boat Harbour Landfill site exceeded several siting parameters while, as noted above, the Northern Pulp site met all environmental siting criteria.

9.2 Criteria

180. NS Environment had no existing criteria or parameters for approving the site of a hazardous waste landfill under the ***Environment Act***. As a result, for the purpose of the Alternative Site Assessment in response to IR82, NS Environment selected criteria from various other jurisdictions, as summarized in the Hive Report (Hive Report, pp. 10-13).

9.3 Boat Harbour Landfill

181. Hive Engineering applied the NS Environment siting criteria to the Boat Harbour Landfill site and concluded that it exceeded 9 of the NS Environment criteria (Hive Report, at p. 15-16):

> The existing waste containment cell has the following siting criteria exceedances:
>
> • NSECC Municipal Solid Waste Guidelines
> o Distance to groundwater from the lowest point of the leak detection system and bottom liner
> o Distance to permanent surface water/wetland from the Cell
> o Distance to Other Properties from the Cell
>
> • National Guidelines for Hazardous Waste Landfills
> o Prevention of Surface Water Contamination
> o Prevention of Contamination in Parks and Wildlife Areas (Including Places of Special Significance)
> o Prevention of Accidental Release of Contaminants (Groundwater Isolation)
>
> • British Columbia Environmental Act Hazardous Waste Regulations
> o With a minimum separation depth of 3 m of unsaturated soil material with a permeability less than 1 x 10-6 cm/s above a seasonally high water table including the zone of capillary rise
> o A person must not locate a secure landfill within 300 m of any nonintermittent watercourse or any other permanent waterbody.
> o Distance to Potable Water Supply (> 100 L/minute.

182. Hive Engineering also looked at other criteria from the same jurisdictions that NS Environment had borrowed the siting criteria for the Alternative Site Assessment, to identify criteria that NS Environment had not adopted (Hive Report at pp. 22-23). Hive applied those criteria to the Boat Harbour Landfill site.

183. Hive concluded that the Boat Harbour Landfill site fails some of the additional criteria from the other jurisdictions that NS Environment omitted, including susceptibility to the impact of a tsunami, given its location next to Boat Harbour, and also its location within a PLFN protected wildlife area. Hive also identified a concern that with the proposed expansion of the Boat Harbour Landfill upward on the same footprint, as currently proposed, the slope failure requirements under the British Columbia ***Environmental Act Hazardous Waste Regulations*** would not be met (Hive Report, p. 23).

9.4 Northern Pulp Landfill Site

184. Hive Engineering applied the NS Environment criteria to the Northern Pulp landfill site and concluded that the Northern Pulp site had no exceedances – it met all criteria (Hive Report, p. 16):

9.5 Conclusion

185. When the Province's own siting criteria are applied to the Boat Harbour Landfill, the current site fails to meet 9 parameters. On the other hand, the Northern Pulp landfill site is ideal in that in meets all NS Environment hazardous waste landfill siting criteria. Better alternatives are available.

10 Socio-Economical and Cultural Impacts of Continuing to Use Boat Harbour Landfill

10.1 Overview

186. The imposition of the Boat Harbour treatment facility was a unique source of historic trauma to PLFN. The hall mark sequalae of historic trauma are present: feelings of sadness, loss, shame and guilt.

187. Governmental indifference to the plight of PLFN which has lasted for nearly 6 decades exacerbated and prolonged the trauma.

188. The result has been worse individual health, including mental health, outcomes within PLFN and an overall feeling of hopelessness and malaise where cynicism and distrust for government abound. This has affected PLFN's economic prospects.

189. The decision to exclude the Boat Harbour Landfill from the scope of the Boat Harbour cleanup and to instead increase its size and use it indefinitely to store 10 times the current volume of toxic waste, will simply perpetuate the historic trauma associated with the Bloat Harbour treatment facility. The socioeconomic and cultural effects of the historic trauma will continue.

10.2 Trauma

190. Historical trauma, including from environmental causes: Evans-Campbell, T. (2008). *Historical Trauma in American Indian/Native Alaska Communities: A Multilevel Framework for Exploring Impacts on Individuals, Families, and Communities*. **Journal of Interpersonal Violence,** 23(3), at p. 316:

> Previous scholarship has identified a broad array of historical events that might contribute to historical trauma in AIAN [American Indian/Alaska Native] communities. These events may target communities or families directly, as in the case of forced boarding school attendance or the outlawing of religious practices, or indirectly, when aimed at the physical environment. Such environmental assaults include radioactive dumping on tribal lands, flooding of homelands, and the introduction of diseases into communities. Some of these events, such as the loss of land and relocation, are common experiences suffered historically by all AIAN communities. Other events, such as the prohibition of whaling in northwestern coast communities, are more culturally or tribally specific. Notably, such historically traumatic events are quite diverse, and, accordingly, the associated reactions are not comparable; trauma reactions stemming from witnessing a community massacre will likely be different from reactions to being forcibly removed from family to attend an Indian boarding school. However, the lens of historical trauma allows us to expand our focus from isolated events and their impacts to the compounding effect of

numerous events over time. [Emphasis added]

191. The consequences of historical trauma, including at a community level, are just now being understood Evans-Campbell, T. (2008), *supra*, at p. 316:

> Research suggests that responses at the individual level fall within the context of individual mental and physical health and may include symptoms of PTSD and guilt, anxiety, grief, and depressive symptomology (e.g., Barocas & Barocas, 1980). Responses at the familial level have received much less research attention; however, emerging work suggests that impacts may include impaired family communication (e.g., Wardi, 1992) and stress around parenting (Brave Heart & DeBruyn, 1998). Finally, at the community level, responses may include the breakdown of traditional culture and values, the loss of traditional rites of passage, high rates of alcoholism, high rates of physical illness (e.g., obesity), and internalized racism (e.g., Duran, Duran, Brave Heart, & Yellow Horse-Davis, 1998). Although research has not yet empirically linked such community-level responses to traumatic events, AIAN scholars and community leaders allude to these connections in their descriptions of pervasive and chronic social malfunction. Indeed, the recognition that events may have effects at the group or community levels is critical in emerging conceptions of historical trauma and implies the possibility of collective group impacts. That is, AIAN individuals may not simply experience individual and family level responses but may also live within the context of a traumatized community.

192. As an Indigenous community in Canada, PLFN suffered historical trauma common to many, if not all, First Nations in Canada. Haskell, L., et al. (2009). *Disrupted Attachments: A social context complex trauma framework and the lives of Aboriginal peoples in Canada*. **International Journal of Indigenous Health**, 5(3).

193. In addition, and unique to PLFN, was the historical trauma caused by the imposition of the Boat Harbour treatment facility on the community beginning in 1967. The stories of the elders who witnessed the transformation of Boat Harbour from a bountiful tidal estuary to a noxious and septic lagoon, bear all the hallmarks of trauma. Some describe the shock and horror of watching thousands of fish perish along the shores of Boat Harbour as they after wriggled to escape the water. Others describe the profound sadness and sense of loss from seeing the area ruined. Still others speak of feelings of guilt for having allowed Boat Harbour to be destroyed. The descendants of the PLFN Chief who held office at the time speak even today of the family's feelings of guilt and shame that Boat Harbour was ruined on their ancestor's watch.

194. The PLFN perspective on the trauma caused by the Boat Harbour treatment facility is well documented: Castleden, H., et al. (2017). *Put It Near the Indians: Indigenous Perspectives on Pulp Mill Contaminants in Their Traditional Territories (Pictou Landing First Nation, Canada)*. **Progress in Community Health Partnerships: Research, Education, and Action**, 11(1). The following excerpts from that article provide a first-person account of PLFN perspectives on Boat Harbour:

Story Layer 1- “All Seasons, All Purpose”: What A’se’k Provided

It was always known as A’se’k before it was called Boat Harbour. It was a recreational place for us, but also our livelihood, a playground, and a work area. There was something to do with every season, like an all-purpose place.

“It was thought of as the other room, where food is stored. Like—nature was storing the food there, ’cause it was there all year round.” (Mary Irene Nicholas)

There was a time when most of our food was from there. Every family was hunting, fishing, trapping, and gathering. We ate healthier then. The salmon ran in the streams, and so many smelts we would take home buckets and buckets of them. We would go down with our shovels and buckets and dig up clams, cooking them right there on the shore.

“That was safe haven for all of us. Everything that we needed was there.” (Sadie Francis)

We did lots of berry picking there, and gathered other plants and medicines too. Women would collect mayflowers and blueberries—sell them in town for a little extra pin money. Older folks knew about the Indian medicines that came from the woods. Going to A’se’k was like a family outing for us. Sometimes there would be a bunch of families gathered, cooking and eating together right there on the shore.

“We would swim and skate, sometimes make a great big bonfire and we’d skate around. Oh my god, it was beautiful —sometimes it’s just the moonlight.” (Martha Denny)

Story Layer 2 – “A’se’k Was a Refuge”: Historical/Cultural Context

We have a connection to these places; our ancestors have occupied this space for thousands of years. The spirit of our people is here. We feel connected to our ancestors in this way. Every time our people ate, it came from the land around us. It is what kept you alive, and it is what kept the people around you alive. When you hunted a deer or a moose, it did not belong to you, it belonged to the community.

“The meat was divided accordingly, nobody was left behind. The men would be up all night carving the meat, and people would come by to pick up their share . . . The people. . . . were looking after the community.” (Sadie Francis)

After European contact and after the reserve system and Indian Act were in place, a lot of our men were going down to the States for work, or maybe looking for a better life. Some men could find odd jobs around the area, as labourers mostly. It would help get us by.

“Back then they were mostly trying to survive. I watched my dad working so hard to get so little.” (Don Francis)

And our kids were being taken away to the Indian Residential School. The Indian Agents would come down to our community, and just take them. But A’se’k, that was like a refuge, a safe place for all of us that they would not venture out to.

When they decided to dump that effluent into A’se’k, everything was supposed to stay ‘ok’. We had no reason to assume otherwise, until we learned of the White man’s way—aklasie’wey. Some people had come down and talked to Chief and Council, duped them into signing that agreement. Some crooked people. Dishonest people. But that is how the Indian Affairs and the non-Native society has been. Their main goal was to get rid of the Indians. It has always been about the almighty dollar for them.

“Well, I guess they didn’t want to put it anywhere else in town. Let’s put it near the Indians—Native people close by, we’ll dump it on them! . . . Let them deal with it. But it’s always us that got dumped on. That’s how they treated us I guess.” (Mary Ellen Denny)

Story Layer 3 - After the Mill Went in . . . ”: Changes to Land and Health

At first, there was nothing to it really, just a mill. But then we saw all the fish dying. The rabbits and the deer—they seemed to disappear. And if we did hunt one, they had strange lumps. All those swampy areas that we used to get our cranberries, all that is under water now, and we do not even know if our medicines are good anymore.

“Our air is polluted, our water is polluted, our land is polluted . . . And they’re all connected.” (Diane Denny)

The pollution is not just in the water, it is in the air too. Sometimes that stink can be so bad we cannot even sit outside. In the beginning it turned our houses black. We found out it was the sulphur drawing the lead out of the paint, so they gave us money to repaint our houses. What is it doing to us? It is everywhere, there is no getting away from it.

“We had to change our diet. The things that we were accustomed to for thousands and thousands of years, those were all of a sudden not available to us anymore. We had to resort to another way of life. And now we have people that have diabetes, heart disease.” (Sadie Francis)

When the land went, so did our health. It is not just the rabbits getting those lumps, it is our people now too. Skin cysts and cancer. A lot of kids have breathing problems, asthma, nosebleeds, sinus headaches, and it is like that stink does something to your

nose. There seems to be a lot more cancer. Growing up, we never knew what cancer was but all of a sudden there are so many different kinds of cancer down here. Looking at all these health problems, we cannot help but wonder if that pollution is the reason.

Story Layer 4 – "Lost, Gone, and Changed": Looking Back, Looking Ahead

It is too bad what happened there; it was such a beautiful place. So now nobody goes down there to hunt or trap, get eels or smelts, snare rabbits or fish. There is no place for kids to walk along the shore, or swim in the summertime. Nothing grows there or lives there anymore, and if it did— we would not trust it. Our community has lost their trust in that food, and our connection seems to have suffered too.

Food from the land was the way it was before Europeans arrived, but in the last couple hundred years it was also a safety net. A'se'k was something our people could fall back on. When the groceries were running low, we always knew we could get food from there. But when the pollution came, we did not even have that anymore. And now the young people, our youth, they are not out there learning in the woods from their Elders.

Everything is gone for us there, and it is like we are getting poorer while that mill is getting richer. We wonder what could have been . . . just think of the beautiful things we could have done down there. And it is not just us that lost out. Everybody all around here lost out, the non-Native community too. And there has been anger. There has been blame. It has divided families, divided our community.

"Everything we used to do, we can't do. What we were brought up on, it's all been taken away." (Don Francis)

We had something good and sacred here. But our stories are slowly being lost in the older generations. We need to tell the younger generations, share our stories and share our knowledge, so that the memory of a clean A'se'k can be preserved. History is not meant to be kept in a closet; it's not doing any good there. It is meant to be shared.

"I had a dream once. I dreamt it was clean, and our community became rich from it. And everybody worked together, in my dream." (Louise Sapier).

195. As articulated above, for decades people in the community feared for their health and that of their family, because of the Boat Harbour treatment facility. PLFN members noted what they felt were high levels of cancer in the community. After being assured at various times that the treatment facility was harmless, the community undertook a community-based study with researchers at Dalhousie University to determine if in fact PLFN did have higher incidence of cancer as perceived. The study validated their concerns: Lewis, D. et al. (2020). *Governmental Fiduciary Failure in Indigenous Environmental Health Justice: The Case of Pictou Landing*

First Nation. **International Journal of Indigenous Health**. 15(1).

10.3 Socioeconomic and cultural implications

196. Former PLFN Chief Andrea Paul summed up the impact of Boat Harbour on PLFN in a November 6, 2013 affidavit:

> 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.

197. More recently, the current Chief Tamara Young has said:

> From my perspective, as a community member. I just knew there was something different about my community compared to others. Other communities would tease us and call us stinky Pictou, and they weren't wrong. It was an embarrassment.
>
> For so long, there was a divide amongst family members. The clans were all in separate sections of the community. This was due to the blame amongst our own for being lied to. Divide and conquer was real for some time here.
>
> As a child I always wondered why we couldn't enjoy the water around us, then to learn it was because we were lied to and so our water got polluted. It was unfair and there was no justice. There is still no justice.
>
> We have numerous community members suffering from mental health, many who suffer without any diagnosis. We have trust issues, any opportunities that sound too good to be true, we are hesitant to take that offer and so we lose out on economic opportunities.

198. The current Chief Executive Officer of PLFN, Michael Polak, has described the Boat Harbour legacy as follows:

> As the Executive Director of the Pictou Landing First Nation, I stand before you today not just as a leader within the community, but as a witness to the profound and pervasive impacts of environmental racism that the people of PLFN have endured for over half a century. The operation of a paper mill in their traditional lands, sanctioned by the Province of Nova Scotia without their consent, has inflicted deep wounds on our land, waters, and very souls. For 55 years, the pollution of our environment paralleled the pollution of their mental, physical, spiritual, emotional, and financial well-being. The repercussions of these actions are not confined to the past; in PLFN they bleed into our present, influencing every facet of our community life and operations.

In our team of 80 full-time employees alone, we face a staggering reality where more than 30 individuals are grappling with serious mental and physical health issues. This is a snapshot of a larger crisis, a tip of the iceberg that hints at the depth of trauma permeating our community. This trauma is a direct result of decades of betrayal and deceit by both provincial authorities and private industries. Promises have been broken, trust has been shattered, and the people's capacity to believe in the possibility of a positive future has been eroded. The fierce resistance within our community towards recent economic opportunities is not a sign of stubbornness, but a symptom of a deep-seated distrust.

The promises made today echo the hollow assurances that accompanied the opening of the paper mill, and our people are rightfully wary. The statistics are harrowing and speak volumes of the cost of environmental racism: in a community of 700, it is profoundly abnormal for over 100 individuals to suffer from mental health and addiction issues. Yet, this is our reality in Pictou Landing First Nation, a reality that is inextricably linked to the pain and suffering inflicted upon the people by the province and the operators of the mill.

The mill's operators continue their fight to reopen, leaving the people's wounds gaping and unhealed. The province has yet to offer adequate settlement or compensation, and remediation efforts for the site have not even begun. This negligence is an open disrespect, a constant reminder of the injustice that still throbs at the heart of this community.

The path to healing is clear. It must be paved with respect for Pictou Landing First Nation's autonomy, and a genuine commitment from the province, the federal government, and the mill's operators to rectify the injustices inflicted upon the people here. The cost of making amends should not be a consideration when it comes to healing the deep wounds of environmental racism. The only way forward is a path defined and led by PLFN, one that acknowledges the harm done and takes concrete steps to address it. This community deserves the opportunity to heal, to rebuild trust, and to thrive on their own terms. Anything less is a continuation of the injustices that have plagued us for too long.

10.4 PLFN Perspective on Continued use of Boat Harbour Landfill

199. In 2021 and again in 2023, PLFN conducted two separate referenda on the use of the Boat Harbour. In both case a significant number of people voted and, in both cases, 98% of the community voted against the long-term use of the Boat Harbour Landfill for the storage of contaminants from Boat Harbour.

200. As the Province points out, a concerned effort on their part was undertaken during that time to convince community members that the Boat Harbour Landfill would pose no risk to PLFN. Despite these efforts, the will of PLFN members did not change.

201. The resolve of PLFN members on this issue when seen in light of the history of trauma and government inaction relating to Boat Harbour is easy to understand. The Province has created expectations as to the cleanup of Boat Harbour and surrounding lands for over 3 decades. Promises of future action hold no weight with PLFN, including the most recent promise that alternatives to the Boat Harbour Landfill might someday be considered.

202. The community has born the adverse environmental impacts of the Boat Harbour treatment facility for half a century and expected the entire area to be remediated. The proposal to leave 1 million cubic meters of toxic sludge on the shores of Boat Harbour, falls far short of community expectations. The community wants it removed completely so its lands can heal and so the community can heal without a constant reminder of the Boat Harbour legacy and without facing another decades long fight to remove it.

11 Conclusion

203. PLFN has a strong claim for Aboriginal title to the land upon which the Boat Harbour Landfill is located and has not consented to its use as a toxic waste landfill which will obviously interfere with the use and enjoyment of the land.

204. Further, while the Province acknowledges that the existing landfill adversely impacts IR 37 and IR 24G and an expanded landfill at the same location would continue to do so, the Province has not justified the infringement under the ***Sparrow*** test. PLFN's analysis, as set out above, shows that the current and future use of the Boat Harbour Landfill is, and would continue to be, an unjustified infringement of its rights. PLFN takes the position that the Province must remove the Boat Habrur Landfill and it cannot be expanded for long-term storage of contaminants from Boat Harbour.

205. PLFN has never been compensated for past adverse impacts of the Boat Harbour Landfill and the Province's proposal to transfer 45 hectares of land as an accommodation measure to compensate PLFN for future adverse impacts of the expanded landfill, have not been agreed to by PLFN and would not, in any event, amount to full compensation.

206. The true measure of compensation is the amount that PLFN would agree to accept in exchange for its consent to the continued use to the Boat Harbour Landfill and its expansion to accommodate sludge from the Boat Harbour remediation project. No negotiation to that end has taken place. PLFN does not consent.

207. The decision to store hazardous waste dredged from Boat Harbour as part of the Project was arrived at in breach of the 2014 Agreement in Principle. This accommodation agreement gave rise to Section 35 protected rights and required the Province to negotiate a remediation agreement with PLFN in good faith. The Province has not even attempted to negotiate a remediation agreement. Such an agreement would, of necessity, address the fate of Boat Harbour Landfill.

208. Consultation on the Project before it was approved by Cabinet was inadequate. The Province chose ad hoc engagement over formal consultation. There was only one consultation meeting before Cabinet approval. At that meeting, PLFN was advised that the Province was still considering other options besides the Boat Harbour Landfill, and that PLFN would have time to present further information before the Province decided. However, the Cabinet decision was made on August 9, 2018, without notice to PLFN and without the full historical record. It appears that the Province had made up its mind on this point before consultation began.

209. The Boat Harbour Landfill fails to satisfy 9 criteria proposed by NS Environment for siting a hazardous waste landfill. Other options exist, including the Northern Pulp landfill which is well suited since it meets all the NS Environment siting criteria for a hazardous waste facility. The Province has not considered this option. Other Crown and private land that appears suitable for a hazardous waste landfill is available within 10 km of Boat Harbour. These lands have not been investigated by the Province even thought the relative cost of doing so is quite low.

210. Finally, and most importantly, the continued use of the Boat Harbour Landfill would be a slap in the face to the members of PLFN who have suffered greatly as a result of the initial decision to create a mill wastewater treatment facility at Boat Harbour in 1967. The initial decision was motivated by racism, as the Province has since acknowledged. PLFN has fought for nearly 6 decades to right that injustice at great cost to the community and its individual members – both on a collective and cultural level as well as on an individual psychological level. For most of that period, the Province ignored its legal and moral obligation to close the treatment facility and remediate Boat Harbour.

211. From 1991 to 2010 the Province promised over and over that it would close the treatment facility and remediate Boat Harbour and the surrounding lands. PLFN waited patiently and gave the Province the benefit of the doubt time and time again so that the mill could remain operational for the greater good. Then, in 2010, the Province reneged on its long-standing promise, forcing PLFN to commence a lawsuit. Finally, following the blockade of a leaking pipeline, the Province entered into the 2014 Agreement in Principle, promising to negotiate with PLFN the terms of the remediation of Boat Harbour. The Province once again failed to live up to its promise and PLFN is now left in the awkward position of having to oppose the Project which it cannot agree with.

212. Should the Boat Harbour Landfill be approved, and should the Province increase its height and add contaminants from the Boat Harbour cleanup, the landfill would only serve as a lasting monument to environmental racism in Nova Scotia. It will be a constant reminder to PLFN members of their status as victims, unable to fully right the wrongs visited upon them. The message will be that, in the end, their voices just didn't matter and that their 30 years of patience, cooperation, forbearance and goodwill mattered not in the end.

213. For the forgoing reasons, PLFN opposes the Project as filed with IAAC on the grounds that it will have a significant impact on PLFN's Aboriginal and treaty rights and will continue the legacy of psychological and cultural harm to PLFN members.

Dated April 23, 2024

<original signed by>

Chief Tamara Young