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Environmental Assessment Branch
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The Honourable Margaret Miller
Minister of Environment
Nova Scotia Environment
1894 Barrington St, Suite 1800
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Sent Via Electronic Mail

Dear Minister Miller:

Re: Reasonable apprehension of bias with respect to the environmental assessment of Northern Pulp's proposed effluent treatment facility

We write to you on behalf of our client, Friends of the Northumberland Strait (“FONS”). As per FONS’ letter to you dated September 27, 2018, FONS is of the view that you, in your position as Minister of Environment, have a significant and direct financial interest in ensuring that the environmental assessment (“EA”) for Northern Pulp’s proposed effluent treatment facility (“ETF”) is concluded as quickly as possible. In addition, your government has ongoing contractual relationships with Northern Pulp that could be interpreted as requiring you to favour Northern Pulp when deciding whether to approve the EA.

Given your position as a Cabinet minister committed to acting in the interest of your government,¹ these factors give rise to a reasonable apprehension of bias with respect to your role in the EA process. As a result, the current EA process, and any decision you make pursuant to s 34 of the *Environment Act*, are void.

On this basis, FONS respectfully requests that you recuse yourself from the EA and delegate your authority to an independent and unbiased body. FONS specifically requests delegation to the Canadian Environmental Assessment Agency (“CEAA”), as this body is familiar with the file and the public has already expressed extensive and unprecedented support for a federal-level assessment.

¹ See *Canadian Union of Public Employees v Ontario (Minister of Labour)*, [2003] 1 SCR 539 at paras 114-116 [Appendix A, Tab 1].

A. Background

(1) The current EA

Northern Pulp currently uses Boat Harbour as its effluent treatment facility, and has done so since the 1960s. However, in 2015 concern about the impacts of the Boat Harbour facility on Pictou Landing First Nation led the Provincial legislature to pass the *Boat Harbour Act* (“*BHA*”). Section 3 of the *BHA* requires Northern Pulp to close the Boat Harbour facility on or before January 31, 2020.²

If the Mill is to continue operating past the closure date, Northern Pulp must have a replacement ETF up and running by that deadline. Unfortunately, Northern Pulp has already publically acknowledged that it will miss the closure date.³ This raises the question of how long the Mill must remain idle after the closure date before it can begin operating its new ETF.

The Province has decided to apply a Class 1 environmental assessment to Northern Pulp’s proposed ETF. This means that your task is to review the information provided by Northern Pulp and to make a determination pursuant to section 34(1) of the *Environment Act*, SNS 1994-95, c 1. Section 34(1) authorizes you to approve or reject the ETF, or to lengthen the EA process by requesting additional information, ordering a focus report or an environmental-assessment report, or referring the project to alternate dispute resolution.

Importantly, any decision that would have the effect of lengthening the EA process could potentially result in further delays in construction and could ultimately add months or even years to the Mill’s closure time.

(2) Reasonable apprehension of bias: the legal framework

The widely accepted and unchallenged test for reasonable apprehension of bias originates with the Supreme Court of Canada’s decision in *Committee for Justice and Liberty*.⁴ That test, which has been adopted by the Nova Scotia Court of Appeal,⁵ is as follows: what would an informed person, viewing the matter realistically and practically, conclude? Would he or she think that it is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly?

A finding of reasonable apprehension of bias is highly fact-specific and must be established via cogent evidence.⁶ However, as a general principle the case law has established that a decision-maker’s pecuniary interest in the outcome of a proceeding, however large or small that interest

² *Boat Harbour Act*, SNS 2015, c 4, s 3 [*BHA*].

³ Paul Withers, “Premier unmoved by Northern Pulp’s ask for more time to close waste water facility,” 31 January 2019, CBC News [Appendix B, Tab 1]; Michael MacDonald, “N.S. mill’s future at risk without extension, Northern Pulp warns,” 1 February 2019, CTV News Atlantic [Appendix B, Tab 1].

⁴ *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369 at 386 [Appendix A, Tab 2].

⁵ *Nova Scotia (Attorney General) v MacLean*, 2017 NSCA 24 at paras 40-41 [*MacLean*] [Appendix A, Tab 3].

⁶ *Ibid*, at para 39.

may be, is grounds for automatic disqualification. This principle was affirmed by the Supreme Court in its 2003 decision in *Wewaykum Indian Band*.⁷

Where a reasonable apprehension of bias exists in a proceeding, it cannot be cured by a subsequent decision. The Supreme Court has been clear that “[t]he damage created by apprehension of bias cannot be remedied. The hearing, and any subsequent order resulting from it, is void.”⁸

As will be illustrated in the following sections, because of your position as a Minister and member of Cabinet, both your government’s pecuniary interest in the outcome of the EA and your government’s contractual relationships with Northern Pulp give rise to a reasonable apprehension of bias in the context of the ongoing EA. As a result, your participation voids the current EA process and any decisions or orders flowing from it, and you are disqualified from participation in any future EA of Northern Pulp’s proposed ETF.

(3) Reasonable apprehension of bias & the public interest

The rule against bias is essential to maintaining public confidence in the administration of justice. This fundamental principle of procedural fairness is all the more important when the decision-maker is tasked with making a decision in the public interest.⁹

You are unquestionably required to have regard for the public interest when making a decision under section 34(1) of the *Environment Act*. The *Act*’s purpose provisions illustrate its clear focus on the public interest, enumerating goals such as the following:

- (a) maintaining environmental protection as essential to the integrity of ecosystems, human health and the socio-economic well-being of society;¹⁰
- (b) maintaining the principles of sustainable development, including the principle of shared responsibility of all Nova Scotians to sustain the environment and the economy, both locally and globally, through individual and government actions;¹¹ and
- (c) providing access to information and facilitating effective public participation in the formulation of decisions affecting the environment [...].¹²

The requirement to have regard for the public interest when making your decision is further emphasized by the *Environmental Assessment Regulations*, NS Reg 26/95 (“*EA Regs*”). Section 12 of the *EA Regs* lists the factors that you must consider when formulating your decision. These include the following:

⁷ *Wewaykum Indian Band v Canada*, 2003 SCC 45 at paras 69-70 [*Wewaykum*] [Appendix A, Tab 4].

⁸ *Newfoundland Telephone Co v Newfoundland*, [1992] 1 SCR 623 at 645 [*Newfoundland Telephone*] [Appendix A, Tab 5].

⁹ *Committee for Justice and Liberty*, *supra* note 4 at 391 [Appendix A, Tab 2].

¹⁰ *Environment Act*, SNS 1994-95, c 1, s 2(a).

¹¹ *Ibid*, s 2(b)(iv).

¹² *Ibid*, s 2(h).

- (a) concerns expressed by the public and aboriginal people about the adverse effects or the environmental effects of the proposed undertaking;¹³
- (b) steps taken by the proponent to address environmental concerns expressed by the public and aboriginal people;¹⁴ and
- (c) potential and known adverse effects or environmental effects of the proposed undertaking [...].¹⁵

As a result, the rule against bias must be observed to the highest possible standard in these circumstances.

(4) The current public controversy

As you are certainly aware, there has been significant public controversy over Northern Pulp's proposed ETF. As a result, our clients anticipate that the EA process, and your initial decision under section 34(1), will be heavily scrutinized. An appearance of bias in this context could result in a widespread loss of public confidence in the administration of justice in the Province.

The public controversy over the proposed ETF has been documented in numerous news stories over the past year. A sample of this extensive media coverage is attached to this submission at **Appendix B, Tab 2**.

The importance of maintaining an unbiased appearance throughout the EA process is all the more important in light of this historic public controversy.

B. The Minister of Environment has a significant and direct financial interest in the outcome of the EA

Your financial interest in the outcome of the current environmental assessment can be divided into two categories:

1. The Province's direct financial investment in the design and development of the new ETF; and
2. Significant unpaid loans from the Province to Northern Pulp.

These two categories will be examined in turn.

(1) The Province has invested directly in the proposed ETF

As documented in the Province's Public Accounts for the fiscal year ended March 31, 2018, Northern Pulp received a \$6 million contribution from the Department of Transportation and Infrastructure Renewal ("TIR").¹⁶ When media contacted TIR about this payment, the Department revealed that it was a "contribution towards detailed design and engineering studies

¹³ *Environmental Assessment Regulations*, NS Reg 26/95, s 12(c) [EA Regs].

¹⁴ *Ibid*, s 12(d).

¹⁵ *Ibid*, s 12(e).

¹⁶ Nova Scotia, *Public Accounts: Volume 3 – Supplement to the Public Accounts for the fiscal year ended March 31, 2018* (Halifax, NS: Communications Nova Scotia, 2018) at p 330 [Appendix B, Tab 3].

for a potential replacement effluent treatment facility.”¹⁷ In addition, TIR noted that it had contributed \$144,980.00 towards design and engineering studies in 2016-2017, for a grand total of \$6.146 million for the fiscal years 2016-2017 and 2017-2018.¹⁸

The results of various requests for information under the provincial *Freedom of Information and Protection of Privacy Act* (“**FOIPOP Act**”) reveal that negotiations between Northern Pulp and TIR over funding for the design and construction of the new ETF continued throughout 2018.¹⁹ This is further confirmed by both the Province and Northern Pulp. For example, in Justice Gabriel’s decision in *Pictou Landing First Nation v Nova Scotia (Aboriginal Affairs)*, he cited a brief from the Province disclosing that “[the Province] is also engaged in confidential discussions directly with Northern Pulp regarding potential crown funding that may be provided to support construction of the new ETF [...]”²⁰

In addition, Terri Fraser, the Mill’s Technical Manager, submitted an affidavit in the context of Northern Pulp’s application for an injunction against a number of fishermen. In that affidavit, she acknowledged the execution of a 2016 agreement between the Province and Northern Pulp to share the cost of “preliminary engineering studies for a replacement ETF,”²¹ and a 2017 funding agreement between the same parties to “allow detailed engineering work to be done, the environmental studies to continue, and allow major equipment to be purchased.”²² Ms. Fraser also stated that the Province and Northern Pulp began negotiating “[...] how the cost of the new ETF should be shared [...]” in September 2017, and that “[t]hose discussions continue today.”²³

Although the Province has not yet revealed the outcome of these funding negotiations, the final cost of the new ETF is estimated to be \$130 million.²⁴ If your decision on the EA were to delay this project further, or even to reject the proposal, the Province could risk losing any anticipated return on its investment. Furthermore, any decision requiring redesign of the ETF, or any measures required to ensure environmental compliance (such as adding tertiary treatment or making changes to enable the mill to utilize a closed-loop effluent treatment system) could result in further significant monetary contributions from the Province. These are, and will be seen as, powerful incentives to approve the current design with no significant changes.

¹⁷ Tim Bousquet, “Northern Pulp, Scotsburn Lumber, and U.S. tariffs,” 8 January 2019, Halifax Examiner [Appendix B, Tab 4].

¹⁸ *Ibid.*

¹⁹ Email from Marla J. MacInnis to Gary S. Porter, 22 August 2018 [Appendix B, Tab 5]; Memorandum from Honourable Lloyd Hines, Minister, Transportation and Infrastructure Renewal to the Executive Council, 15 May 2018 [Appendix B, Tab 5].

²⁰ *Pictou Landing First Nation v Nova Scotia (Aboriginal Affairs)*, 2018 NSSC 306 at para 7 [Appendix B, Tab 6].

²¹ Affidavit of Terri Fraser, Sworn 30 November 2018, para 17 [Appendix B, Tab 7].

²² *Ibid.*, para 26.

²³ *Ibid.*, para 22.

²⁴ Chris Muise, “Northern Pulp Seeks Extension,” 6 February 2019, The Advocate [Appendix B, Tab 8]; Keith Doucette, “Northern Pulp mill formally registers controversial effluent treatment project,” 7 February 2019, Globalnews.ca [Appendix B, Tab 8].

(2) The Province has provided significant loans to Northern Pulp, many of which remain outstanding

In 2017, the Department of Business disclosed that between 2009 and 2017 it had loaned Northern Pulp and its affiliates a total of \$110.8 million (plus an additional \$900,000 in “incentives”).²⁵ \$3.6 million was repaid in August 2016, leaving the remaining \$107.2 million outstanding.²⁶

Although the details of these loans have not been disclosed, it is clear that the Province has provided very substantial financing for the Mill over the past decade. Logic dictates that a lengthy or even permanent closure of the Mill resulting from the EA process could jeopardize the Province’s chances of recouping these investments.

These financial connections between the Province and Northern Pulp create a significant and direct pecuniary interest on your part in the outcome of the EA process. It is clear that the Province is at risk of suffering a significant financial blow if the Mill is forced to close, even temporarily, as of January 31, 2020 – and that financial blow may worsen the longer the Mill is required to stay idle. As a member of Cabinet, you have a collective responsibility with your colleagues to pursue positive financial outcomes for your government, or at the very least to avoid devastating financial losses.²⁷ Although Northern Pulp has now acknowledged that it will miss the closure deadline, the decisions relating to the process and outcome of the EA will be a contributing factor in determining the length of the Mill’s closure. In other words, your decision on the EA could result directly in a significant increase in the Province’s financial liability.

These circumstances create an obvious bias toward approving the project as quickly as possible.

C. Extensive contractual relationships between the Province and Northern Pulp prevent the Minister from making impartial regulatory decisions impacting Northern Pulp’s operations

On December 1, 1995, the Province entered into a Memorandum of Understanding (“MOU”)²⁸ with Scott Maritimes Limited, a prior owner and operator of the Mill. The MOU is extensive, but for our purposes the two relevant clauses are as follows:

4.01(d) Nova Scotia agrees to undertake a clean-up program with respect to the [Boat Harbour] Facility prior to the commencement of the Lease with Scott [...] If a

²⁵ Department of Business, “FOIPOP 2017-03648-BUS – Loans to Northern Pulp and Affiliates,” June 2017 [Appendix B, Tab 9]; Bousquet, “Northern Pulp, Scotsburn Lumber, and U.S. tariffs,” *supra* note 17 [Appendix B, Tab 4].

²⁶ Although we do not have updated information on outstanding loans, with the exception of the \$3.6 million repaid in August 2016 all of the repayable loans disclosed by the Department of Business in 2017 were listed as having terms ending in 2023 or later.

²⁷ See *Canadian Union of Public Employees*, *supra* note 1 at paras 114-116 [Appendix A, Tab 1].

²⁸ Memorandum of Understanding between Her Majesty the Queen in Right of Nova Scotia and Scott Maritimes Limited, 1 December 1995 [Appendix B, Tab 10].

pipeline and diffuser is required by any level of government during the term of the Lease it shall be installed at the sole expense of Nova Scotia.

[...]

4.01(l) Nova Scotia agrees to use its best efforts to assist Scott obtain [sic] all necessary permits, consents and approvals to permit the construction and operation of a replacement effluent treatment facility to replace the [Boat Harbour] Facility at the expiration of the term of the Lease.

The MOU, including the two provisions cited above, continues to operate as between the Province and Northern Pulp. On May 12, 2008, the Province signed an “Acknowledgement Agreement”²⁹ with Northern Pulp that states, in part, as follows:

[T]he Province acknowledges, agrees and confirms that [...] the Memorandum of Understanding between the Province and Scott dated December 1, 1995 and the Indemnity Agreement between the Province and Scott dated December 31, 1995 shall continue to apply with respect to the ongoing operation of the Effluent Treatment system, Purchaser’s [sic] use of the Lands [...] and Purchaser’s use of Boat Harbour [...].

The obligations imposed by these two provisions appear to be completely at odds with your obligation to conduct an independent, neutral and unbiased EA. In fact, these provisions suggest that a decision to reject the proposed ETF, or to lengthen the EA process by requesting further information, could result in contractual liability for the Province.

Northern Pulp is also party to a number of other long-standing agreements with the Province. These agreements include the Indemnity Agreement³⁰ referenced above, a Lease³¹ and a License Agreement³² both dated December 31, 1995, and a 2002 Lease Extension Agreement.³³ These agreements impose various obligations on the Province in relation to Northern Pulp’s proposed ETF.

In fact, Northern Pulp has stated publicly that its various contracts with the Province should be determinative of the results of administrative approval processes. As per its 2015 appeal of the Industrial Approval issued by the Province, “[g]overnment cannot arbitrarily revoke Northern Pulp’s contractual rights under the Agreements with the Province by way of an administrative

²⁹ Acknowledgement Agreement from Her Majesty the Queen in Right of the Province of Nova Scotia to Northern Pulp NS LP, its affiliates and Northern Pulp Nova Scotia Corporation, 12 May 2008 [Appendix B, Tab 11].

³⁰ Indemnity Agreement between Her Majesty the Queen in Right of the Province of Nova Scotia and Scott Maritimes Limited, 31 December 1995 [Appendix B, Tab 12].

³¹ Lease between Her Majesty the Queen in Right of the Province of Nova Scotia and Scott Maritimes Limited, 31 December 1995 [Appendix B, Tab 13].

³² License Agreement between Her Majesty the Queen in Right of the Province of Nova Scotia and Scott Maritimes Limited, 31 December 1995 [Appendix B, Tab 14].

³³ Lease Extension Agreement between Her Majesty the Queen in Right of the Province of Nova Scotia and Kimberly-Clark Inc, 22 October 2002 [Appendix B, Tab 15].

approval process.”³⁴ In response to this appeal, Randy Delorey, then Minister of the Environment, revoked a number of the conditions originally included in the 2015 Industrial Approval, and agreed to re-examine others³⁵ – suggesting that the Province is concerned about the potential contractual liability resulting from its efforts to effectively regulate Northern Pulp’s operations.

Northern Pulp also refers explicitly to the Province’s potential contractual liability in its Registration Document for the current EA. At section 1.0, it states as follows:

At the date of Registration, the Province of Nova Scotia has made contributions to the cost planning and design of the project. The contributions may be off set against any future award Northern Pulp may be granted for damages against the Province in any respect due to early termination of the present [Boat Harbour Effluent Treatment Facility] lease.³⁶

This statement speaks for itself, but Northern Pulp apparently contemplates a claim for damages for “early termination” of the Boat Harbour lease (which currently extends until 2030). Once again, it stands to reason that such a damages claim, and the Province’s alleged liability, for early termination of the Boat Harbour lease will increase the longer the Mill stays idle.

Your position as a member of Cabinet creates a direct interest in upholding the Province’s contractual obligations and/or minimizing the liability associated with any unavoidable contractual disputes and litigation. As a result, these extensive contractual relationships between the Province and Northern Pulp gives rise to a reasonable apprehension of bias in the context of the ongoing EA.

D. The Minister must recuse herself from the EA and delegate her authority to an independent and unbiased body

As a consequence of this apprehension of bias, the current EA process is void.³⁷ In addition, in your capacity as Minister of Environment you are disqualified from presiding over and making decisions under section 34 of the *Environment Act* in relation to the current EA. You are likewise disqualified from making decisions in relation to any future EA of Northern Pulp’s proposed ETF.³⁸

Accordingly, FONS respectfully requests that you recuse yourself from the EA and delegate your authority under section 34(1) of the *Environment Act* to an independent and unbiased body.

³⁴ Letter from Ms. Terri Fraser, Technical Manager Northern Pulp Nova Scotia Corporation, to the Honourable Randy Delorey, Minister of Environment, 9 April 2015 [Appendix B, Tab 16].

³⁵ Letter from the Honourable Randy Delorey, Minister of Environment, to Ms. Terri Fraser, Technical Manager Northern Pulp Nova Scotia Corporation, 9 July 2015 [Appendix B, Tab 17].

³⁶ Northern Pulp Nova Scotia Corporation, *Environmental Assessment Registration Document: Replacement Effluent Treatment Facility*, 31 January 2019 at p 1.

³⁷ *Newfoundland Telephone*, *supra* note 8 at 645 [Appendix A, Tab 5].

³⁸ *Wewaykum*, *supra* note 7 at paras 69-73 [Appendix A, Tab 4].

FONS specifically asks that you delegate the EA to the Canadian Environmental Assessment Agency. This delegation is authorized by section 17 of the *Environment Act*.

We look forward to hearing from you on this important matter.

Sincerely,



James Gunvaldsen Klaassen
Barrister & Solicitor



Sarah McDonald
Barrister & Solicitor

Enclosures

Appendix A – Case Law, Tabs 1-5

Appendix B – Evidence, Tabs 1-17