

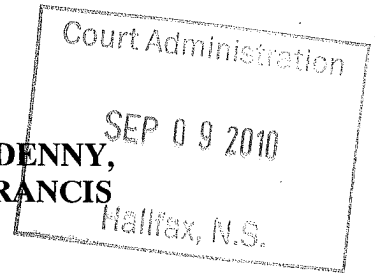
2010

Hfx No. 335 700

**SUPREME COURT OF NOVA SCOTIA**

BETWEEN:

**CHIEF AILEEN FRANCIS, WAYNE DENNY, DOMINIC DENNY,  
DEBBIE DYKSTRA, CRYSTAL DENNY and ALDEN J. FRANCIS**  
on their own behalf and on behalf of all members of  
the **PICTOU LANDING FIRST NATION**



**PLAINTIFFS**

- and -

**THE ATTORNEY GENERAL OF NOVA SCOTIA** representing  
**HER MAJESTY THE QUEEN** in right of  
the **PROVINCE OF NOVA SCOTIA**

**FIRST DEFENDANT**

- and -

**NORTHERN PULP NOVA SCOTIA CORPORATION**  
a body corporate

**SECOND DEFENDANT**

- and -

**NEENAH PAPER COMPANY OF CANADA**  
a body corporate

**THIRD DEFENDANT**

- and -

**KIMBERLY CLARK INC.**  
a body corporate

**FOURTH DEFENDANT**

- and -

**KIMBERLY CLARK NOVA SCOTIA INCORPORATED**  
a body corporate

**FIFTH DEFENDANT**

**NOTICE OF ACTION**

**To: The Attorney General of Nova Scotia  
Northern Pulp Nova Scotia Corporation  
Neenah Paper Company of Canada  
Kimberly Clark Inc.  
Kimberly Clark Nova Scotia Incorporated**

**Action has been started against you**

The plaintiffs take action against you.

The plaintiffs started the action by filing this notice with the court on the date certified by the prothonotary.

The plaintiffs claim the relief described in the attached statement of claim. The claim is based on the grounds stated in the statement of claim.

**Deadline for defending the action**

To defend the action, you or your counsel must file a notice of defence with the court no more than the following number of days after the day this notice of action is delivered to you:

- 15 days if delivery is made in Nova Scotia
- 30 days if delivery is made elsewhere in Canada
- 45 days if delivery is made anywhere else.

**Judgment against you if you do not defend**

The court may grant an order for the relief claimed without further notice, unless you file the notice of defence before the deadline.

**You may demand notice of steps in the action**

If you do not have a defence to the claim or you do not choose to defend it you may, if you wish to have further notice, file a demand for notice.

If you file a demand for notice, the plaintiff must notify you before obtaining an order for the relief claimed and, unless the court orders otherwise, you will be entitled to notice of each other step in the action.

**Rule 57 - Action for Damages Under \$100,000**

Civil Procedure Rule 57 limits pretrial and trial procedures in a defended action so it will be more economical. The Rule applies if the plaintiff states the action is within the Rule. Otherwise, the Rule does not apply, except as a possible basis for costs against the plaintiff.

This action is *not within* Rule 57.

**Filing and delivering documents**

Any documents you file with the court must be filed at the office of the Law Courts, 1815 Upper Water Street, Nova Scotia, (902) 424-4900.

When you file a document you must immediately deliver a copy of it to each other party entitled to notice, unless the document is part of an *ex parte* motion, the parties agree delivery is not required, or a judge orders it is not required.

**Contact information**

The plaintiffs designate the following address:

Brian J. Hebert  
Wickwire Holm  
1801 Hollis Street – Suite 2100  
P.O. Box 1054  
Halifax, NS B3J 2X6  
Tel: (902) 429-4111

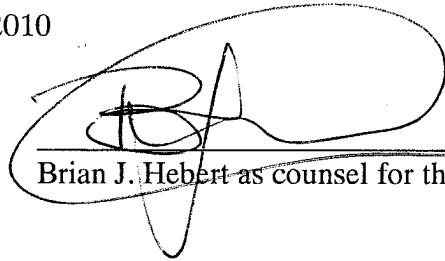
Documents delivered to this address are considered received by the plaintiff on delivery. Further contact information is available from the prothonotary.

**Proposed place of trial**

The plaintiffs propose that, if you defend this action, the trial will be held in, Nova Scotia.

**Signature**

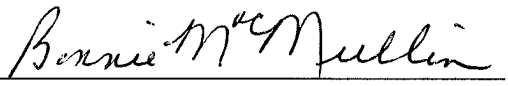
Signed at Halifax, Nova Scotia on September 9, 2010



Brian J. Hebert as counsel for the Plaintiffs

**Prothonotary's certificate**

I certify that this notice of action, including the attached statement of claim, was filed with the court on *September 9*, 2010.



Prothonotary

BONNIE MACMULLIN  
Deputy Prothonotary

2010

Hfx No.

**SUPREME COURT OF NOVA SCOTIA**

BETWEEN:

**CHIEF AILEEN FRANCIS, WAYNE DENNY, DOMINIC DENNY,  
DEBBIE DYKSTRA, CRYSTAL DENNY and ALDEN J. FRANCIS**  
on their own behalf and on behalf of all members of  
the **PICTOU LANDING FIRST NATION**

PLAINTIFFS

- and -

**THE ATTORNEY GENERAL OF NOVA SCOTIA** representing  
**HER MAJESTY THE QUEEN** in right of  
the **PROVINCE OF NOVA SCOTIA**

FIRST DEFENDANT

- and -

**NORTHERN PULP NOVA SCOTIA CORPORATION**  
a body corporate

SECOND DEFENDANT

- and -

**NEENAH PAPER COMPANY OF CANADA**  
a body corporate

THIRD DEFENDANT

- and -

**KIMBERLY CLARK INC.**  
a body corporate

FOURTH DEFENDANT

- and -

**KIMBERLY CLARK NOVA SCOTIA INCORPORATED**  
a body corporate

FIFTH DEFENDANT

**STATEMENT OF CLAIM**

## THE FACTS

### The Parties

1. The Plaintiffs, Chief Aileen Francis, Wayne Denny, Dominic Denny, Debbie Dykstra, Crystal Denny and Alden J. Francis, are the duly elected Chief and Council of the Pictou Landing First Nation and bring this action on their own behalf and on behalf of all other members of the Pictou Landing First Nation past, present and future. The members of the Pictou Landing First Nation are descendants of the original inhabitants of the Province of Nova Scotia. In their own language they are known as “Lnu” and in English as “Mi’kmaq”. The two terms are used interchangeably throughout this statement of claim. Members of the Pictou Landing First Nation are “Indians” and the Pictou Landing First Nation is a “band” within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5, as amended. Pictou Landing First Nation is also known as the “Pictou Landing Indian Band”. The Plaintiffs prefer to be called the “Pictou Landing First Nation” and that term will be used throughout this statement of claim. The members of the Pictou Landing First Nation are an "aboriginal people" within the meaning of s. 35 of the *Constitution Act*, 1982 (U.K.), 1982, c. 11.

2. The First Defendant is her Majesty the Queen in the Right of the Province of Nova Scotia (the “Province”).

3. The Second Defendant, Northern Pulp Nova Scotia Corporation (“Northern Pulp”), is a body corporate with its head office at Abercrombie Point, Nova Scotia and since June 2008 has been the owner and operator of a kraft pulp mill at Abercrombie Point, Nova Scotia (the “Mill”) and the lessee and operator of a pipeline, two primary settling ponds and an aerated stabilization

basin (“ASB”) used for holding industrial wastewater from the Mill (collectively the “Treatment Facility”).

4. The Third Defendant, Neenah Paper Company of Canada (“Neenah Paper”), is a body corporate with its head office at Alpharetti, Georgia and was the owner and operator of the Mill and lessee and operator of the Treatment Facility from November 2004 to June 2008.

5. The Fourth Defendant, Kimberly Clark Inc. (“Kimberly Clark”), is a body corporate with its head office at Mississauga, Ontario and was the owner and operator of the Mill and lessee and operator of the Treatment Facility from 1997 to November 2004.

6. The Fifth Defendant, Kimberly Clark Nova Scotia Incorporated (formerly known as Scott Maritimes Limited and Scott Maritimes Pulp Limited) (“Scott Maritimes”), is a body corporate, with its head office at Mississauga, Ontario and was at all material times the owner and operator of the Mill from 1967 to 1997 and lessee and operator of the Treatment Facility from 1995 to 1997.

### **Traditional Lands**

7. The Lnu or Mi’kmaq were part of the Algonquin nation, a large nation that occupied the eastern coast of what is now North America from Virginia to Labrador. Within the Algonquin nation, the Lnu occupied a large territory including what is now known as Nova Scotia, Prince Edward Island, eastern and northern New Brunswick and the Gaspé area of Quebec.

8. The Lnu lived a traditional life as fishers, hunters and gatherers throughout their territory including in and around a small tidal estuary connected by a narrow channel to the

Northumberland Strait near what is now known as Pictou Landing. It was near this estuary that the ancestors of the Pictou Landing First Nation lived on a seasonal basis. The estuary was a bountiful source of a variety of food including fish, eels, crustaceans and shellfish. They hunted and trapped near its shores. The estuary provided a safe harbour for vessels and a sheltered recreational area. The estuary was so important to the life of the ancestors that they treated it as part of their home and called it “A’Se’K” (pronounced “Ah-sag”) which means “the other room” in Lnu. The term “A’Se’K” will be used throughout this statement of claim to refer to the estuary out of respect for the traditions of the Pictou Landing First Nation.

9. Following contact with Europeans in the 16<sup>th</sup> century the ancestors continued to occupy, hunt, fish and gather and harvest food and wood throughout their territory including the area in and around A’Se’K.

### **Treaty of 1760**

10. After England defeated France in Nova Scotia, the British Crown entered into a treaty with the ancestors of the Pictou Landing First Nation in 1760. This treaty implicitly recognised the right of the ancestors to occupy, hunt, fish, gather and harvest on lands within their territory including lands at A’Se’K.

### **1761 - Promises of Legal Protection for Land**

11. In 1761, at a treaty ceremony, Lieutenant Governor Jonathan Belcher, later the first Chief Justice of Nova Scotia, assured the ancestors of the Pictou Landing First Nation that the laws of England would protect their rights and property in these words:

The Laws will be like a great Hedge about your Rights and properties, if any break this Hedge to hurt and injure you, the heavy weight of the Laws will fall upon them and punish their Disobedience.

12. Also in 1761 a Royal Proclamation was issued in Nova Scotia acknowledging that the ancestors of the Pictou Landing First Nation had made a claim to all land along the northeastern shore of Nova Scotia, including the area around A'Se'K, and forbidding any settlement in the area.

13. In 1763 France formally ceded North America to England and England promptly issued the Royal Proclamation of 1763 providing for four colonial territories in North America, none of which included Nova Scotia, and setting out the manner of acquiring land lying outside these four territories from their original inhabitants. The Proclamation set out the process by which such lands could be surrendered to the Crown.

14. The effect of the Royal Proclamation of 1763 in Nova Scotia was to make it unlawful for the local government to grant any interest in land that had not been ceded or surrendered to the Crown in accordance with the Proclamation.

#### **1766 - Lnu Understanding of Treaty Rights to Land**

15. In 1766 the ancestors of the Pictou Landing First Nation assembled at Chapel Island in Cape Breton with other Lnu and declared that no settlement would be allowed in Pictou as they understood that this land had been set aside for their use in earlier treaties including the Treaty of 1760.



### **1770's - Failure of the Law to Protect Treaty and Aboriginal Rights to Land**

16. Despite the treaty of 1760, the assurances given by Lieutenant Governor Belcher, the Royal Proclamation of 1761, the Royal Proclamation of 1763 and the fact that no land had been ceded or surrendered by the ancestors of the Pictou Landing First Nation, settlers began settling in the area around A'Se'K beginning in 1777.

### **Indian Cross Point Burying Grounds**

17. Soon all of the land in the area was the subject of a Crown grant except for an estimated 34 acres of land containing burial grounds of the ancestors of the Pictou Landing First Nation on the eastern shore of the East River a few kilometres from A'Se'K. There is no record that these lands were formally set apart for the ancestors of the Pictou Landing First Nation but they are designated on early maps as "Indian Burying Grounds" (the "Burying Grounds") in an area known as Indian Cross Point.

18. Settlers soon made claim even to the Burying Grounds. In 1784 two chiefs granted a deed to one acre of the Burying Grounds directly to James Carmichael in a transaction that failed to comply with the surrender provisions of the Royal Proclamation of 1763. Fifty years later in 1834 James Carmichael would convey this acre of land to Margaret McConnell but would purport to convey the entire Burying Grounds.

### **1828 - Dispossessed of All Traditional Land**

19. In the meantime, the ancestors of the Pictou Landing First Nation continued to live in the area around A'Se'K despite the Crown grants to settlers. For over fifty years they continued to occupy, hunt, fish and gather and harvest an area near A'Se'K. However, the settlers viewed

them as trespassers and in 1828 they were prevented from planting crops in the area and ordered to leave by the settler who held a Crown grant for the land.

20. Without any recognized territory, the ancestors of the Pictou Landing First Nation petitioned the government to acquire lands from the settlers near A'Se'K to be set apart for their exclusive use as had been done in other parts of the Province. Without any land base at all, many were destitute and relied on the Province for their subsistence.

#### **1864 - Finally 50 Acres of Land**

21. In 1864 the Province finally acquired 50 acres of land near A'Se'K (using "Indian money" from the sale of "Indian lands" in Cape Breton) and set it apart for the exclusive use and enjoyment of the ancestors of the Pictou Landing First Nation, who numbered 159 at the time.

#### **1867 – 1960 - More Land for Firewood**

22. With Confederation in 1867, the legal title to these 50 acres passed from Nova Scotia to Canada and became known as Fisher's Grant Indian Reserve No. 24. Over the next 100 years several more small parcels of land were acquired by Canada near A'Se'K (again using "Indian money") and set apart for the ancestors of the Pictou Landing First Nation as food and fuel supplies proved inadequate on the original 50 acres. These included Fisher's Grant Indian Reserves No. 24A, 24B, 24C, 24D, 24E, 24F and 24G.

23. Over time the Pictou Landing First Nation built homes and other buildings on their lands.

### **1960 - Division of Nova Scotia Mi'kmaq into Bands**

24. In 1960 the Department of Indian Affairs divided the Mi'kmaq of Nova Scotia into several bands. The "Pictou Landing Indian Band" was created and the records of the Indian Land Registry maintained by the Department of Indian Affairs were changed to record that all reserve lands in Pictou County were now set apart for the Pictou Landing First Nation.

### **1962 - Amalgamation of Reserve Land**

25. In 1962 the Department of Indian Affairs amalgamated Fisher's Grant Indian Reserves No. 24, 24A, 24B, 24C, 24D and 24F into one reserve known as Fisher's Grant Indian Reserve No. 24 ("I. R. No. 24") (I. R. No. 24E had been previously sold).

### **1963 and 1964 - Even More Land for Firewood**

26. Between 1963 and 1964 two-100 acre lots near A'Se'K were acquired by Canada using "Indian money" and set apart for the Pictou Landing First Nation as the Boat Harbour West Indian Reserve No. 37 ("I. R. No. 37") bringing the total amount of land set apart for the Pictou Landing First Nation around A'Se'K to 691 acres: I. R. No. 24 (349 acres), I. R. No. 24G (142 acres) and I. R. No. 37 (200 acres).

### **1964 - Limited Means and Opportunities**

27. By 1964 the Pictou Landing First Nation had few economic opportunities. Some members were engaged in the food and commercial fishery. However, literacy rates and education levels were low. Unemployment rates were high. Prevailing attitudes in the area created barriers to employment. The Pictou Landing First Nation had no collective source of

revenues other than funding from the Department of Indian Affairs. It would be years before their treaty rights would be interpreted by the Courts to provide any meaningful economic opportunities.

### **1964 - Importance of A'Se'K and Beach Front**

28. A'Se'K continued to be an important part of the life of the Pictou Landing First Nation. In this "other room" they fished eels and other fish, harvested lobster and shellfish, moored their fishing vessels and swam. They continued to occupy, hunt, fish gather and harvest on the lands adjacent A'Se'K.

29. The Northumberland Strait was also important to the Pictou Landing First Nation. Here they fished, harvested lobster and other shellfish, and swam in its warm waters in summer, particularly at the adjacent Lighthouse Beach.

30. Lighthouse Beach was a fine sand beach that was also popular with other residents of Pictou County due to its proximity to Trenton and New Glasgow some 10 kilometres away. In need of additional revenues, the Pictou Landing First Nation had established a canteen near the beach and had plans to further develop their lands along the Northumberland Strait to take advantage of its location near Lighthouse Beach which could only be accessed on foot over I. R.

No. 24

31. The community did not get the chance to do so.

### **Plans for a Pulp Mill**

32. In or around 1964 Scott Maritimes decided to build the Mill at Abercrombie Point several kilometres away from A'Se'K on the western side of the East River. When completed the Mill would discharge up to 25 million gallons of toxic wastewater per day as a by-product of the pulping process. The Province agreed to provide an adequate supply of clean water to the Mill as well as a place to discharge the wastewater after its use in the pulping process. Federal regulations prohibited discharging pulp wastewater directly into the Northumberland Strait.

### **Plans for Treating Toxic Wastewater**

33. The Province and Scott Maritimes devised a plan for the wastewater. It would be carried by pipeline to the eastern edge of I. R. No. 37 where it would be discharged into an open ditch and allowed to flow over the uninhabited Reserve to a primary settling lagoon to the east of I. R. No. 37. The primary settling lagoon would be created by constructing a dam across the upper reaches of A'Se'K at its western end to isolate the lagoon from the rest of A'Se'K. The wastewater would remain in the primary settling lagoon for a period of time during which some suspended solids would settle to the bottom. The wastewater would then flow over or through the first dam into a much larger secondary lagoon formed by the construction of a second dam under Highway 348 where it crossed the channel connecting A'Se'K to the Northumberland Strait. After remaining in the secondary lagoon for a time during which further suspended solids would settle, the wastewater would be discharged over or through the second dam into the channel leading to the Northumberland Strait.

34. Both Nova Scotia and Scott Maritimes were aware that the wastewater would contain toxic and other chemicals and organic waste from the pulping process that would contaminate A'Se'K and render its waters unsuitable for any other uses.

35. The Province and Scott Maritimes agreed that the Province would expropriate or otherwise acquire from private owners an interest in land along the proposed pipeline route and around A'Se'K.

36. The Province and Scott Maritimes also agreed that the Province would acquire the riparian rights of the Pictou Landing First Nation in and to the waters of A'Se'K and accordingly the Province, through the Nova Scotia Water Commission, approached the Department of Indian Affairs, which was responsible for managing Reserve lands, and proposed the purchase of the riparian rights of the Pictou Landing First Nation in and to the waters of A'Se'K.

#### **1965 - Chief and Council Worried about Adverse Impacts**

37. When the proposal was brought to the Chief and Council of the Pictou Landing First Nation, they expressed concern that the wastewater would cause, among other things, odour problems that would adversely affect their community.

#### **Assurances that there would be no Adverse Impacts**

38. The Province and Scott Maritimes assured representatives of Indian Affairs and Chief and Council that while the waters of A'Se'K would no longer be suitable for fishing or

recreation, the project would have no other adverse impacts on the use and enjoyment of the lands set apart for the Pictou Landing First Nation.

39. To convince Chief and Council that odour would not be a problem and there would be no adverse impacts on the community living nearby, the Province and Scott Maritimes arranged a trip to a new domestic wastewater treatment facility in Saint John, New Brunswick in October 1965. There the Chief and one Councillor were shown a holding pond containing colorless and odourless water. The Chief and the Councillor were impressed by this and were assured by representatives of the Province and Scott Maritimes that the quality of wastewater in A'Se'K would likewise be odour free.

#### **Detrimental Reliance**

40. Relying on these assurances and on the Honour of the Crown, the Chief and the Councillor signed a handwritten document on October 10, 1965, while still in Saint John, agreeing in principle to the project on behalf of the Pictou Landing First Nation.

41. Ironically, the Chief and the Councillor were motivated by the prospects of economic opportunities for all of Pictou County, as the only reason given for their decision in the short document was their belief that the new Mill would be "in the best interest of the entire area".

42. On October 21, 1965 a Band Council Resolution was signed by Chief and Council purporting to accept an immediate lump sum payment of \$60,000 in consideration of the permanent loss of fishing and hunting revenue and other benefits derived from the use of A'Se'K

with a final settlement to be subject to further negotiations between the Province and the Department of Indian Affairs. The Band Council Resolution contained several conditions including that the Province would provide a slipway for boats to enter and leave A'Se'K.

#### **1966 - Commitment to Correct Adverse Impacts**

43. Subsequently, further discussions took place between Indian Affairs and the Province. Indian Affairs secured a commitment from the Province that if, after the introduction of wastewater, a septic condition arose in A'Se'K that adversely affected the Pictou Landing First Nation, the Province would take corrective action.

#### **Federal O-I-C with Conditions**

44. On September 2, 1966 a Federal Order-in-Council was issued which purported to authorize the transfer of the riparian rights of the Pictou Landing First Nation in and to A'Se'K to the Province subject to certain terms and conditions including, *inter alia*: (a) the payment by the Province of \$60,000 for the benefit of Pictou Landing First Nation; (b) provision by the Province of a slipway for boats if requested by Pictou Landing First Nation; and (c) remedial action to be taken by the Province if a septic condition detrimental to the Pictou Landing First Nation developed in A'Se'K.

#### **No Rights Surrendered or Acquired**

45. The riparian rights of the Pictou Landing First Nation were not surrendered in accordance with the provisions of the *Indian Act* which required approval by referendum of all members of the Pictou Landing First Nation eligible to vote. Nor did the purported transaction comply with



the expropriation provisions of the *Indian Act*. Both the Province and Scott Maritimes knew, or ought to have known, that the transaction did not comply with the *Indian Act* and that the Order-in-Council was *ultra vires* the Governor-in-Council.

46. Further, despite the plan to construct the pipeline through the Burying Grounds and discharge the wastewater into a ditch traversing I. R. No. 37, no interest in the Burying Grounds or in I. R. No. 37 was acquired from Pictou Landing First Nation for those purposes. Nor was any effort made to acquire the right to flood parts of I. R. No. 24 and I. R. No. 24G along the shores of A'Se'K or to create a nuisance affecting the use and enjoyment of the lands set apart for the Pictou Landing First Nation in the area.

#### **1967 - Province Goes Ahead with Project**

47. The Province subsequently constructed the pipeline and the two dams at A'Se'K as planned. No slipway was created to allow boats to access A'Se'K from the Northumberland Strait.

48. The Mill went into operation in September, 1967 and immediately began discharging wastewater at the rate of nearly 25 million gallons per day. As planned, the wastewater flowed into the pipeline, was carried through the Burying Grounds and was discharged into the open ditch at I.R. No. 37 where it was channelled across the newly acquired Reserve and into the primary settling lagoon.

### **New Chapter**

49. Within a few days of start-up the primary settling lagoon and the secondary lagoon were full of toxic wastewater, beginning a new chapter in the long and sad struggle of the Pictou Landing First Nation for the protection of their land in accordance with the Law that Chief Justice Belcher two centuries earlier had assured them would be like a Great Hedge about their rights and property.

### **Toxic Mixture**

50. The wastewater contained a mix of chemicals including some of the most dangerous toxic pollutants: dioxins, furans, chloride, mercury and other heavy metals.

### **Septic Conditions**

51. Organic matter in the wastewater was a natural by-product of the pulping process and turned the wastewater dark brown in colour. Organisms feeding off the organic matter consumed all of the oxygen in the lagoons. Larger organic sediments blocked the sunlight preventing photosynthesis at lower depths.

52. The combined effect of these chemicals and organic matter was to render A'Se'K septic and devoid of life.

### **Pollution of Beach Front**

53. The adverse effects of the wastewater were not limited to the waters of A'Se'K. As the wastewater was discharged into the Northumberland Strait it dispersed in a dark coloured plume

floating above the natural waters of the Strait. The plume extended from the mouth of the channel leading from A'Se'K along the shores of I. R. No. 24 and further along the shores of Lighthouse Beach leaving the water in these areas dark brown and full of floating debris and creating a brown foam along the shore. At times this foam reached a thickness of several feet and blew about like tumbleweed in the wind on the deserted Lighthouse Beach; for as a result of these conditions visitors stopped frequenting the beach and have not returned since.

### **Air Pollution and Nuisance**

54. The wastewater not only ruined the waters of A'Se'K and the Northumberland Strait, but also contained noxious gasses, primarily foul smelling sulphur compounds and mercaptans, which escaped into the air and were carried by the prevailing wind to I. R. No. 24 where they invaded the homes and offices, gardens and playgrounds of the Pictou Landing First Nation.

55. The concentration of these chemicals in the air was so strong that at times members of the Pictou Landing First Nation had difficulty breathing. Others developed headaches or became nauseous. The chemicals were so concentrated that they caused a chemical reaction with paint on homes and other buildings in the community turning them black in colour and causing the paint to peel.

56. For over 40 years the residents of Pictou Landing First Nation community have endured the repugnant smell of "rotten eggs" which infiltrated and now permeates their homes, offices, cars and trucks and causes them to constantly worry about the health and safety of their children and themselves.

57. These repugnant smells continue to assault the senses of the members of the Pictou Landing First Nation residing there and seriously interfere with the use and enjoyment of their land.

### **Flooding**

58. The Province failed to maintain the level of wastewater in A'Se'K below the ordinary high water mark which resulted in flooding of portions of I. R. No. 24, I. R. No. 24G and I. R. No. 37. The flooding not only deprived the Pictou Landing First Nation of the use and enjoyment of the flooded land but also led to the deposit of sediment from the wastewater containing toxic chemicals on the flooded areas thereby contaminating the soil.

### **1967 - Efforts to Seek Redress**

59. The Pictou Landing First Nation immediately complained to the Province and to Scott Maritimes about the conditions in A'Se'K and asked that remedial action be taken.

### **1970 - 25 year Wastewater Agreement**

60. Two years later, on September 30, 1970, despite receiving complaints from the Pictou Landing First Nation about the conditions in A'Se'K, the Province entered into a 25-year agreement (the "Wastewater Agreement") with Scott Maritimes whereby the Province agreed to accept wastewater at A'Se'K until September 30, 1995. The Pictou Landing First Nation was not consulted about the Wastewater Agreement despite the obvious adverse impacts on them.

61. Indian Affairs also became involved and brought the conditions at A'Se'K to the attention of the Province, but took no legal action against the Province or Scott Maritimes when asked to do so by Pictou Landing First Nation.

#### **1974 - Upgrades Fail to Correct Septic Conditions**

62. In 1974 the Province took steps to alleviate the septic conditions. It replaced the primary settling lagoon with two settling ponds and created an aerated stabilization basin ("ASB") by installing another dam in the western end of A'Se'K near the settling ponds. It also installed mechanical aerators in the ASB to introduce more oxygen into the wastewater. From the ASB the wastewater would flow into the main body of A'Se'K which was now called a "finishing pond" where the wastewater would still remain for several days until discharge into the Northumberland Strait.

63. At the same time the Province extended the pipeline around I. R. No. 37 so that wastewater would be discharged from the pipeline directly into the new primary settling ponds thereby avoiding I. R. 37 altogether.

64. Despite these modifications, septic conditions remained in A'Se'K and noxious gasses continued to descend upon the small First Nation community interfering with the use and enjoyment of their land.

### **Upgrades Lead to Noise Pollution**

65. In addition, the mechanical aerators now introduced industrial noise to the area, further interfering with the use and enjoyment of the lands of the Pictou Landing First Nation.

### **No Slipway Built**

66. Despite requests from Pictou Landing First Nation no slipway was ever built to allow boats to enter or leave A'Se'K.

67. The Pictou Landing First Nation continued to petition the Province and the Department of Indian Affairs for remedial measures to combat conditions in A'Se'K. The Department of Indian Affairs provided limited funding to enable Pictou Landing First Nation to hire lawyers to seek redress from the Province. However, these efforts were insufficient due to lack of sufficient funding and produced few results. Indian Affairs, as legal owner of the Reserves still refused to take legal action against the Province.

### **1986 - Law Suit Against Canada**

68. Finally in 1986 the Pictou Landing First Nation commenced an action against Canada as represented by the Minister of Indian Affairs. The action was framed in breach of fiduciary duty for Canada's role in allowing the Province and Scott Maritimes to use A'Se'K as a toxic dump.

### **1991 and 1992 - Promises to End the Pollution of A'Se'K**

69. By 1991 Canada agreed to negotiate a settlement with Pictou Landing First Nation for its role in permitting the Province and Scott Maritimes to pollute A'Se'K. At the same time, the

Province promised Pictou Landing First Nation that it would abate the adverse effects of the wastewater in A'Se'K on the Pictou Landing First Nation by ending the discharge of wastewater into A'Se'K after the Wastewater Agreement with Scott Maritimes expired in 1995. The Province also promised to remediate A'Se'K after the discharge of wastewater was discontinued so that it would once again be a tidal estuary open to the Northumberland Strait. The Province repeated the same promises in 1992.

### **1993 - Settlement with Canada**

70. In July 1993 the Pictou Landing First Nation reached a settlement of their action against Canada believing that the Province intended to end the discharge of wastewater into A'Se'K after 1995. The settlement with Canada did not fully compensate the Pictou Landing First Nation for the impacts of the wastewater operations on them, nor did Canada have the authority to end the discharge of wastewater into A'Se'K. For this the Pictou Landing First Nation relied on the Honour of the Provincial Crown accepting its assurances that it would end the discharge of wastewater into A'Se'K after the Wastewater Agreement expired in 1995 and thereafter clean up and remediate A'Se'K to its natural state.

71. Shortly afterward a committee known as the Boat Harbour Committee was formed to plan for the remediation of A'Se'K after expiry of the Wastewater Agreement in 1995. The committee included representatives of the Province, Canada and Pictou Landing First Nation. The committee met regularly to discuss the remediation of A'Se'K.

### **1995 – More Promises to Stop Pollution and Remediate**

72. However, by the time the Wastewater Agreement expired no alternative site had been found to receive wastewater from the Mill. Instead the Province decided to continue the discharge of wastewater into A'Se'K until December 31, 2005 in order to give Scott Maritimes time to build new wastewater facilities at another location.. The Province assured the Pictou Landing First Nation that the use of A'Se'K as a receiving body for wastewater from the Mill would be ended by December 31, 2005 and A'Se'K remediated. that time

### **1995 - 10 Year Lease and Licence**

73. The Province entered into a memorandum of understanding with Scott Maritimes dated December 1, 1995 wherein it agreed to extend the term of the Wastewater Agreement from October 1, 1995 to December 31, 2005. At the same time it agreed to, and did, enter into a 10-year lease (the "Lease") of the pipeline and the Crown lands on which the two primary settling ponds and the ASB were located. In addition the Province agreed to, and did, grant to Scott Maritimes a licence (the "Licence") for a 10-year term, permitting it to discharge wastewater from the ASB into the main body of A'Se'K as a finishing pond. The term of both the Lease and the Licence ran from January 1, 1996 to December 31, 2005.

74. The effect of the Lease and Licence was to transfer responsibility for the pipeline and wastewater operations at A'Se'K from the Province to Scott Maritimes. The Province was aware at all times that Scott Maritimes intended to continue the discharge of wastewater into A'Se'K under the Lease and Licence up to and including December 31, 2005, yet took no steps to consult with or ensure that the rights of the Pictou Landing First Nation were accommodated in the terms



of the Lease or Licence. However, based on promises from the Province to end the discharge in 2005, Pictou Landing First Nation took no action in respect of the discharge of wastewater into A'Se'K and looked forward in good faith to December 31, 2005, relying at all times on the Honour of the Crown.

75. In 1997, 123 acres of land adjacent to I. R. No. 24 were acquired as the population of the community expanded and were later added to I. R. No. 24.

#### **1997 - Transfer of Lease and Licence to Kimberly Clark**

76. Scott Maritimes continued to operate the Mill and to discharge 25 million gallons of wastewater into A'Se'K each day of operation, until it transferred ownership of the Mill and its interest in the Lease and Licence to Kimberly Clark in 1997. The Province agreed to the transfer of the Lease and Licence to Kimberly Clark without consultation with the Pictou Landing First Nation and accommodation of its interests.

77. Thereafter Kimberley Clark continued to operate the Mill and discharge 25 million gallons of wastewater each day into A'Se'K.

#### **2000 – Cost of Solution \$48-60 Million**

78. Sometime in or around the year 2000, Kimberly Clark commissioned an engineering report to estimate the cost of building a replacement wastewater treatment facility as the Lease and Licence were to expire on December 31, 2005. The Cost was estimated at between \$48 and \$60 million.

**2001 - The Pipeline Proposal**

79. Not wanting to incur the cost of building a replacement wastewater treatment facility, the Province and Scott Maritimes settled on an alternative proposal wherein the settling ponds and ASB would remain at their existing location adjacent A'Se'K. However, instead of discharging wastewater from the ASB into a finishing pond in A'Se'K, the wastewater would be routed by means of a pipeline through A'Se'K and discharged directly into the channel at the mouth of A'Se'K (the "Pipeline Proposal").

**Representation that Pipeline Proposal Feasible**

80. The Province and Kimberly Clark brought the Pipeline Proposal to the Pictou Landing First Nation for its consent. They represented to the Pictou Landing First Nation that the Pipeline Project had been studied and was technically feasible. Kimberly Clark agreed to install the new pipeline and the Province promised that once the new pipeline was installed it would remove the toxic sediments from the bottom of the finishing pond in A'Se'K, remove the dam under Highway 348 and return A'Se'K to its natural state.

**Detrimental Reliance - MOU**

81. In 2001, relying on the Honour of the Crown and the representations of the Province and Kimberly Clark as to the feasibility of the Pipeline Project, the Pictou Landing First Nation entered into a memorandum of understanding ("MOU") with Kimberly Clark, wherein Kimberly Clark agreed to install the pipeline contemplated in the Pipeline Proposal in a timely manner so as to allow the Province to remediate A'Se'K and return it to its natural state by December 31,

2005 (the “Remediation Deadline”). In exchange Pictou Landing First Nation agreed not to protest the continued use the settling ponds and the ASB up to December 31, 2030.

#### **Extension of Lease without Consultation or Notice**

82. After securing the MOU but before the pipeline was built, the Province extended the term of the Lease to December 31, 2030 by way of an Extension Agreement dated October 22, 2002. The Province did not consult with the Pictou Landing First Nation before entering into the Extension Agreement and made no provision in the Extension Agreement for the termination of the Lease if the Pipeline Proposal was not implemented as contemplated in the MOU. The term of the Licence however remained unaffected by the Extension Agreement and would still expire on December 31, 2005.

#### **2004 - Transfer to Neenah Paper**

83. In 2004 the ownership of the Mill was transferred from Kimberly Clark to Neenah Paper and the Lease and Licence assigned with the consent of the Province. The Province acted without consulting the Pictou Landing First Nation or accommodating its interests.

84. Thereafter Neenah Paper operated the Mill and continued to discharge 25 million gallons of wastewater each day into A'Se'K.

**2005 - Pipeline Proposal Not Feasible**

85. As December 31, 2005 approached the Province and Neenah Paper advised Pictou Landing First Nation that the Pipeline Project was not technically feasible contrary to their earlier representations, as it would not likely pass an environmental assessment.

**2006 - Extension of Remediation Deadline under MOU**

86. On December 31, 2005 the Licence expired and the Remediation Deadline passed. Neenah Paper continued to discharge wastewater into A'Se'K with the full knowledge and consent of the Province. The Province and Neenah Paper asked the Pictou Landing First Nation to extend the Remediation Deadline in the MOU to December 31, 2008 to allow more time to find an alternative means of discharging wastewater from the ASB to the Northumberland Strait.

87. In September 2006 the Pictou Landing First Nation did agree to extend the Remediation Deadline to December 31, 2008 giving the Province and Neenah Paper three more years to resolve the problem.

**2008 - Extension of Licence without Notice or Consultation**

88. In May, 2008 the Province, Neenah Paper and Northern Pulp discussed the proposed transfer of ownership of the Mill from Neenah Paper to Northern Pulp. Northern Pulp requested and received assurances from the Province that it would have a continued right to operate the primary settling ponds and the ASB under the Lease until 2030 and to discharge wastewater into A'Se'K under the terms of the Licence over the same period of time.

89. Without notifying or consulting with the Pictou Landing First Nation, on May 13, 2008 the Province agreed to extend the Licence after December 31, 2008 on a month-to-month basis even though the Province was aware of the adverse impacts that the discharge of wastewater into A'Se'K continued to have on the members of the Pictou Landing First Nation.

### **Transfer to Northern Pulp**

90. The transfer of ownership of the Mill from Neenah Paper to Northern Pulp did take place in June 2008. At that time the Pictou Landing First Nation put the Province on notice that any decision to extend the Licence would trigger a duty on the part of the Province to consult with and accommodate the rights of the Pictou Landing First Nation. The Pictou Landing First Nation was not aware that a decision had already been made to extend the Licence on a month-to-month basis.

### **June 18, 2008 - Promise not to Extend the Licence without Consultation**

91. In response, and without advising the Pictou Landing First Nation of the month-to-month extension, the Province asked the Pictou Landing First Nation not to protest an extension of the Licence to December 31, 2008 (to coincide with the Remediation Deadline) and promised that the Licence would not be extended beyond December 31, 2008 without further consultation with the Pictou Landing First Nation. On June 11, 2008 the Pictou Landing First Nation agreed and took no steps to protest the extension of the Licence to December 31, 2008.

92. In October, 2008 as the Remediation Deadline approached, engineers retained by the Province and Northern Pulp to find alternatives to the Pipeline Proposal reported that there were

no other feasible means of discharging wastewater into the Northumberland Strait from the ASB that would allow A'Se'K to be remediated as contemplated in the MOU and accordingly the ongoing use of the ASB and the remediation of A'Se'K as contemplated in the MOU were incompatible.

#### **November 19, 2008 - Renewed Demands to end Discharge of Wastewater**

93. In light of this, on November 19, 2008 the Chief of the Pictou Landing First Nation wrote to the Province advising that the Pictou Landing First Nation would not agree to any further extension of the Licence and demanded that the Province end the discharge of wastewater into A'Se'K as of December 31, 2008. The letter outlined the adverse impacts of the wastewater operations on the Pictou Landing First Nation and detailed the violation of constitutionally protected aboriginal and treaty rights occasioned by the continued use of A'Se'K as a dumping place for industrial wastewater.

#### **December 2, 2008 - Recognition of Adverse Impacts and Decision to Accommodate**

94. In response, no less than three Provincial Cabinet Ministers met with the Chief of the Pictou Landing First Nation on December 2, 2008 and advised her that a Cabinet decision had been made and that the Province would relocate the settling ponds and the ASB, recognizing the long standing adverse impacts on the Pictou Landing First Nation. The Ministers said that the Province would like the Mill to continue to operate during the time it took to build replacement facilities elsewhere. The Ministers told the Chief that the Province would appoint a negotiator to negotiate with the Pictou Landing First Nation for a reasonable timetable and work plan for decommissioning the settlement ponds and the ASB and remediating A'Se'K. The Ministers also

told the Chief that the Province would make a contribution to the Pictou Landing First Nation in consideration of the further inconvenience of having wastewater discharged into A'Se'K until a new facility was completed. The Ministers advised that the project would cost at least \$90 million, but the Province was prepared to spend the money to resolve the problem. These commitments were confirmed in a letter dated December 4, 2008 from Murray Scott, Minister of Transportation and Infrastructure Renewal.

95. Relying on these promises and on the Honour of the Crown, the Pictou Landing First Nation took no immediate steps to protest the continued discharge of wastewater into A'Se'K after the Remediation Deadline expired on December 31, 2008 and in April, 2009 entered into a forbearance agreement with Northern Pulp.

#### **March 2009 – Negotiation of Details of Accommodation Begins**

96. In March, 2009 Pictou Landing First Nation entered into negotiations with a negotiator appointed by the Province as promised.

#### **June 2009 - Failure to Implement Accommodation Decision**

97. Negotiations had not progressed far by the time of the Nova Scotia General Election of June 9, 2009. Afterward negotiations ceased without explanation. Finally in September 2009 the new Minister of Transportation and Public Works met with the Chief and Council of the Pictou Landing First Nation and assured them that solving the wastewater problem at A'Se'K was a top priority for the Province, but that he as a new Minister would need time to study the problem to

ensure that the approach outlined in the letter of December 4, 2008 was the right approach. The Minister reminded Chief and Council that the Province was facing financial difficulties.

98. Relying once again on the Honour of the Crown, Pictou Landing First Nation waited in good faith for the continued implementation of the accommodation decision contained in the letter of December 4, 2008.

99. However, 6 months passed with no word from the Province. The Pictou Landing First Nation asked the Province to confirm whether or not it would honour the decision to accommodate as set out in the December 4, 2008 letter. The Province declined to take a position stating that it was still studying the matter. The Province provided the Pictou Landing First Nation with no explanation as to what process it was following to study the matter and provided no additional information to Pictou Landing First Nation nor did it request further information from the Pictou Landing First Nation. Pictou Landing First Nation was not invited to participate in the deliberations in any way.

### **March 1, 2010 - Loan Agreement to Northern Pulp**

100. While the silence from the Province was deafening on the clean up of A'Se'K, in the background the Province had entered into discussions with Northern Pulp aimed at providing public funds to Northern Pulp to allow Northern Pulp to buy 475,000 acres of private forestland in Nova Scotia for \$81 million. On March 1, 2010, the day of the sale, the Province announced that it had agreed to loan Northern Pulp \$75 million to purchase the land and was at the same time buying 55,000 acres of the land from Northern Pulp for \$16.5 million (the "Land Deal"). In



total \$91.5 million flowed from the Province to Northern Pulp for the stated purpose of ensuring the long-term feasibility of the Mill. Of this Northern Pulp used \$81 million to buy the lands leaving it with a surplus of \$10.5 million.

### **The Last Straw**

101. Pictou Landing First Nation had not been advised of the impending Land Deal and only learned about it when it was publicly announced the day of the sale. The Land Deal was meant to secure a long-term supply of wood for the Mill which under current operating conditions meant the long-term discharge of wastewater into A'Se'K and the continued interference with the aboriginal and treaty rights of the Pictou Landing First Nation. However no consultation took place with Pictou Landing First Nation in respect of the Land Deal and no accommodation was made of the rights of the Pictou Landing First Nation by, for instances, requiring the changes to eliminate or improve conditions at A'Se'K. In contrast to this, the Province had secured the assurance of Northern Pulp that it would use part of the \$10.5 million surplus from the Land Deal to to reduce emissions from the stacks at the Mill. While important to those living closer to the Mill, the lowering of stack emissions would not alleviate the odour problems at I. R. No. 24 which emanate from the wastewater in A'Se'K. The Province did not require Northern Pulp to take a single step to alleviate the adverse impacts of the wastewater treatment at A'Se'K on the Pictou Landing First Nation.

102. Moreover, the Province had obviously turned its mind to the question of consultation and accommodation of aboriginal interests as the Land Deal contained a term requiring Northern Pulp to make reasonable efforts to conclude a benefits agreement with the Pictou Landing First

Nation and all Nova Scotia Mi'kmaq by December 31, 2011. However, this clause was vague and left the Pictou Landing First Nation with so little bargaining strength, as the Land Deal had already been completed, that it wholly failed to accommodate the interests of the Pictou Landing First Nation, particularly in regard to adverse impacts related to the wastewater at A'Se'K.

103. To make matters worse, the \$91.5 million given by the Province to Northern Pulp on March 1, 2010 in the Land Deal was the same amount that the Province had estimated as the cost of carrying out its accommodation decision as set out in the December 4, 2008 letter.

#### **April 19, 2010 - Demand to Terminate Licence**

104. Pictou Landing First Nation was struck by the contrast between the speed and commitment shown by the Province in facilitating the Loan Deal and the lack of progress in ending the discharge of effluent into A'Se'K despite the costs of both projects being very similar. Accordingly on April 19, 2010, Pictou Landing First Nation asked the Province to terminate the Licence effective June 30, 2010 by giving proper notice to Northern Pulp.

#### **June 30, 2010 – No Termination**

105. June 30, 2010 passed without any changes to the discharge of wastewater into A'Se'K. No changes have taken place since. Wastewater continues to be discharged into A'Se'K at the rate of 25 million gallons per day. The Province has provided no reasons for its decision to refuse the demands of the Pictou Landing First Nation to terminate the Licence as at June 30, 2010, nor has the Province accommodated the interests of the Pictou Landing First Nation in that decision.

## LEGAL CLAIMS

### Interference with Aboriginal and Treaty Rights - Land

106. The Plaintiffs say that they have constitutional, treaty, aboriginal, statutory and Common Law rights to the use and enjoyment of lands set apart for them including I. R. No. 24, I. R. No. 24G and I. R. No. 37. These rights include the right to be free of airborne contaminants, obnoxious odours and industrial noise and the right to hunt, fish gather and harvest without worrying that fish, game, fowl and plants found on their lands are contaminated by toxic chemicals. The Plaintiffs repeat the facts recited above and say that the Defendants, and each of them, have unjustifiably interfered with these constitutional, treaty and aboriginal rights contrary to Section 35 of the *Constitution Act*, the Treaty of 1760, the Royal Proclamation of 1761, the Royal Proclamation of 1763, the *Indian Act*, Common Law and such other treaties, proclamations and laws that may be found to be applicable on the evidence.

### Interference with Aboriginal and Treaty Rights - Water

107. The Plaintiffs further say that they have constitutional, treaty, aboriginal, statutory and Common Law rights to the use and enjoyment of the waters adjacent to the lands set apart for them including the waters of A'Se'K and the Northumberland Strait. These rights include the right to hunt, fish, gather, harvest, navigate, and engage in recreational and cultural activities in and on the waters adjacent to their lands. It is an implied term of the Treaty of 1760 that the waters adjacent to the lands set aside for the use and enjoyment of the Pictou Landing First Nation would be left in their natural state so as to permit the Plaintiffs to exercise their Treaty, aboriginal, statutory and Common Law rights in and on those waters. The Plaintiffs repeat the

facts recited above and say that the Defendants have interfered with these constitutional, treaty, aboriginal, statutory and Common Law rights contrary to Section 35 of the *Constitution Act*, the Treaty of 1760, the Royal Proclamation of 1761, the Royal Proclamation of 1763, the *Indian Act*, Common Law and such other treaties, proclamations and laws that may be found to be applicable on the evidence.

### **Transfer of Riparian Rights Void**

108. The Plaintiffs say that the purported transfer of riparian rights of the Pictou Landing First Nation in 1966 was void *ab initio* as: (i) it failed to comply with the provisions of the Royal Proclamation of 1761, the Royal Proclamation of 1763, the *Indian Act* and the Common Law of aboriginal title; (ii) it was undertaken on the basis of fraudulent or negligent misrepresentations by the Province that the wastewater project to be undertaken by the Province could be undertaken without adversely affecting the use and enjoyment of I.R. No. 24, which misrepresentations were intended to, and in fact did, induce Pictou Landing First Nation to transfer its riparian rights and which it otherwise would not have done; (iii) it was undertaken on the basis of a mutual, common or unilateral mistaken belief as described in (ii) above; (iv) the Province, as a fiduciary, deceived the Pictou Landing First Nation as described in (ii) above; (v) the Province has acted in bad faith in performing its obligations under the transfer as described in (ii) above; and/or (vi) it was an unconscionable transaction for the reasons described in (ii) above and because there was an inequality of bargaining power between the Province and Pictou Landing First Nation, which the Province unfairly and inequitably used to its advantage in negotiating a transfer that was detrimental to Pictou Landing First Nation for grossly inadequate consideration.

**Breach of Contract to Operate so as to Avoid Adverse Impacts**

109. In the alternative, the Plaintiffs say that if the transfer of riparian rights in 1967 was not void *ab initio*, then there was an agreement between the Province and Pictou Landing First Nation governing the transfer of the riparian rights which contained an expressed or implied provision that the Province would conduct its wastewater treatment operations at A'Se'K so as to avoid interference with the use and enjoyment of lands set apart for the Pictou Landing First Nation and would correct septic conditions that arose in A'Se'K as a result of its wastewater operations. The Plaintiffs say that Province failed to conduct its wastewater operations as agreed and that septic conditions did arise and continue to exist in A'Se'K and that the Province breached and continues to breach the agreement in failing to adequately correct those conditions and in failing to cease its wastewater operations when it became clear that the operations could not be conducted without interference with the use and enjoyment of the lands set apart for the Pictou Landing First Nation or so as to avoid septic conditions in A'Se'K.

**Breach of Collateral Contract to Operate so as to Avoid Adverse Impacts**

110. In the further alternative, the Plaintiffs say that if the transfer of riparian rights in 1967 was not void *ab initio* then the Province promised to operate its wastewater treatment facility at A'Se'K such that the wastewater would not interfere in anyway with the use and enjoyment of the lands set apart for the Pictou Landing First Nation near A'Se'K and further promised to correct any septic conditions that occurred in A'Se'K. These promises were made to secure the transfer of the riparian rights by Canada and formed a collateral contract between the Province and the Pictou Landing First Nation. The Plaintiffs say that the Province failed to conduct its

wastewater operations as agreed and that septic conditions did arise and continue to exist in A'Se'K and that the Province breached the collateral contract in failing to adequately correct those conditions and in failing to cease its wastewater operations when it became clear that the operations could not be conducted without interference with the use and enjoyment of the lands set apart for the Pictou Landing First Nation or so as to avoid septic conditions in A'Se'K.

### **Misrepresentation as to Ability to Operate so as to Avoid Adverse Impacts**

111. In the further alternative, the Plaintiffs say that if the transfer of riparian rights in 1967 was not void *ab initio* then the Pictou Landing First Nation was induced to consent to the transfer by the false representations of the Province and of Scott Maritimes that the wastewater operations at A'Se'K could be operated so as to avoid interference in any way with the use and enjoyment of the lands set apart for the Pictou Landing First Nation and to avoid septic conditions, which representations were false. The Pictou Landing First Nation acted on these representations to its detriment in consenting to the transfer of its riparian rights. The Plaintiffs say that the representations were fraudulent or, in the alternative, negligent and render the transfer voidable.

### **Nuisance**

112. The Plaintiffs further say that the presence of toxins and other chemicals in the water and air and the obnoxious odours and noise associated with the wastewater operations at A'Se'K interfere and continue to interfere with the use and enjoyment of lands set apart for the Pictou Landing First Nation and adjacent waters and are nuisances.

**Strict Liability**

113. The Plaintiffs further say that the production of pulp at the Mill and the storage of wastewater from the pulping process at A'Se'K are inherently dangerous activities and the chemicals and pulp by-products in the wastewater are dangerous things that the Defendants produced and/or brought onto their land and which escaped into A'Se'K and the Northumberland Strait and onto the Plaintiffs' land and the Defendants are therefore strictly liable for the damages caused by the escape of toxins, chemicals and organic matter found in the wastewater under the Rule in *Rylands v. Fletcher*.

**Trespass to Land**

114. The Plaintiffs further say that the flooding of reserve land and the use of I. R. 37 as a conduit for wastewater constituted a trespass to property and an intentional interference with the constitutional, treaty and aboriginal rights of the Pictou Landing First Nation.

**Promises of 1991 and 1992 - Collateral Contracts**

115. The Plaintiffs say that in 1991 and 1992 the Province promised the Pictou Landing First Nation that it would discontinue the discharge of wastewater from the Mill into A'Se'K and would subsequently remediate A'Se'K in order to induce the Pictou Landing First Nation to enter into a settlement agreement with Canada. Pictou Landing First Nation did enter into a settlement agreement with Canada in 1993. The Pictou Landing First Nation say that the promises made by the Province amounted to a collateral contract that has been breached by the Province.

**Promises of 1993 to 1995 - Collateral Contracts**

116. The Plaintiffs further say that from 1993 to 1995 the Province again promised the Pictou Landing First Nation that it would not permit the discharge of wastewater from the Mill into A'Se'K and would subsequently remediate A'Se'K by December 31, 2005 in order to induce the Pictou Landing First Nation to forbear from taking action against the Defendants to prevent the continued interference with the use and enjoyment of the lands set apart for the Pictou Landing First Nation and with other constitutional, treaty, aboriginal, statutory, contractual, Equitable and Common Law rights of the Pictou Landing First Nation. The Pictou Landing First Nation relying on these promises did forbear from taking such action and say that these promises amount to a collateral contract which has been breached by the Province.

**Fraudulent or Negligent Misrepresentation as to Feasibility of the Pipeline Proposal**

117. The Plaintiffs further say that in 2000 the Province and Kimberly Clark represented to the Pictou Landing First Nation that the Pipeline Project was technically feasible in order to induce the Pictou Landing First Nation to enter into the MOU with Kimberly Clark. This representation was either false and was made fraudulently or, in the alternative, negligently. Pictou Landing First Nation entered into the MOU to its detriment in reliance on this representation and accordingly it would be inequitable to enforce the MOU.

**MOU Fundamentally Breached or Frustrated**

118. In the alternative, the Plaintiffs say that it was a fundamental covenant of the MOU that Kimberly Clark and its successors and assigns would take all reasonable action to ensure that the Pipeline Proposal could be carried out before the Remediation Deadline. Kimberly Clark,



Neenah Paper and Northern Pulp each failed to take all reasonable steps, including but not limited to, the installation of a primary clarifier and a tertiary treatment system, to ensure that wastewater could be discharged into the channel leading from A'Se'K to the Northumberland Strait so as to permit the Pipeline Proposal to be carried out in compliance with environmental laws and regulations. The Plaintiffs say that Kimberly Clark, Neenah Paper and Northern Pulp each committed a fundamental breach of the MOU. In the further alternative the Plaintiffs say that the MOU was frustrated by the inability of the Defendants to obtain environmental regulatory approvals for the Pipeline Proposal when such approval was a fundamental mutual assumption of the parties when entering into the MOU.

**Letter of December 4, 2008 – Decision to Accommodate**

119. The Province has a fiduciary, Common Law and constitutional duty flowing from s. 35(1) of the *Constitution Act, 1982*, to consult and, if indicated, accommodate the Pictou Landing First Nation, when the Province contemplates conduct that might adversely affect a treaty or aboriginal right of the Pictou Landing First Nation.

120. The Plaintiffs say that the letter of December 4, 2008 contains (a) an acknowledgement that the wastewater operations at A'Se'K have interfered, and continue to interfere, with the aboriginal and treaty rights of the Pictou Landing First Nation and (b) a written decision and promise to accommodate those interests by (i) prohibiting the discharge of wastewater into A'Se'K after allowing a reasonable time for the establishment of another facility to receive wastewater from the Mill at another location, (ii) remediating Boat Harbour and (iii) compensating the Pictou Landing First Nation for continuing adverse impacts during the period

required to carry out (i) and (ii). The Province subsequently, without reason, justification or consultation with the Pictou Landing First Nation, decided not to follow its own decision and in doing so acted in bad faith, in violation of the constitutionally protected aboriginal and treaty rights of the Pictou Landing First Nation and in breach of its duty to consult and accommodate.

#### **Letter of December 4, 2008 - Collateral Contract**

121. In the alternative, the Plaintiffs say that the promises made in the letter of December 4, 2008 were made to induce the Pictou Landing First Nation to forbear from taking legal action against Northern Pulp and the Province. The Pictou Landing First Nation says that it did enter into a forbearance agreement with Northern Pulp in April, 2009 and did in fact forbear from taking action against the Province and Northern Pulp and says that the promises by the Provinces amount to a binding collateral contract which was breached by the Province.

#### **Failure to Consult and Accommodate**

122. The Plaintiffs say that the duty to consult with, and if indicated, accommodate the interests of the Pictou Landing First Nation existed since 1964 when the Province learned about the plans for the Mill and that the Province has since failed to adequately consult with or accommodate the interests of the Pictou Landing First Nation in respect of any of its decisions or actions relating to the wastewater operations at A'Se'K, including in respect of the Land Deal, and accordingly has breached its duty to consult and accommodate.

#### **Pipeline Lease Invalid at Indian Cross Point**

123. The Plaintiffs say that Pictou Landing First Nation has aboriginal title to Burying Grounds at Indian Cross Point and that the Burying Grounds were set apart for their exclusive use and enjoyment. The Plaintiffs further say that the Province had, and has, no authority by virtue of the Treaty of 1760, the Royal Proclamation of 1761, the Royal Proclamation of 1763, the *Constitution Act, 1982*, the *Indian Act* and such other treaties that might on the evidence apply, to lease any part of the Burying Grounds and that the Lease is invalid in so far as it purports to grant an interest in the Burying Grounds to Scott Maritimes and its assignees.

#### **Continuing Trespass at Indian Cross Point**

124. The Plaintiffs further say that the construction of the pipeline and the continuing use of the pipeline to transmit wastewater to A'Se'K constituted and continues to constitute a continuing trespass and a violation of the constitutionally protected aboriginal and treaty rights of the Pictou Landing First Nation.

#### **Negligent Wastewater Operations**

125. The Defendants owed a duty of care to the Plaintiffs to design, construct, operate and maintain the pipeline, the dams, the primary settling lagoon, the secondary lagoon, the settling ponds, the ASB and the finishing pond at A'Se'K (the "Wastewater Works") so as to avoid harm to the Pictou Landing First Nation. The Defendants failed to design, construct, operate and maintain the Wastewater Works in accordance with generally accepted engineering and wastewater treatment practices or otherwise so as to avoid harm to the Pictou Landing First Nation as described herein and have thereby breached the duty of care owed to the Plaintiffs. The Defendants knew or ought to have known that designing, constructing, operating and

maintaining the Wastewater Works as they did, would cause foreseeable harm to the Pictou Landing First Nation and its members. As a result of the negligence of the Defendants the Plaintiffs have suffered injury, loss and damage including personal injury and economic losses.

### **Liability as Landlord**

126. The Plaintiffs say that the Province owed a duty of care to the Plaintiffs to avoid leasing the Wastewater Works to anyone whom it knew, or ought to have known, intended to operate and maintain the Wastewater Works in such a manner as to cause harm to the Plaintiffs. The Province knew or ought to have known that Scott Maritimes and its assignees intended to operate and maintain the Wastewater Works in such a manner as to cause harm to the Plaintiffs. Nonetheless the Province negligently entered into the Lease for the Wastewater Works with Scott Maritimes and in doing so breached its duty of care to the Plaintiffs. As a result of the negligence of the Province, Scott Maritimes and its assigns have operated and maintained the Wastewater Works under the Lease so as to cause harm to the Pictou Landing First Nation as described herein. As a result of the negligence of the Defendants the Plaintiffs have suffered injury, loss and damage including personal injury and economic losses.

127. In the alternative the Plaintiffs say that in so far as the Defendants other than the Province (the “Lessee Defendants”) are liable to the Plaintiffs for damages arising from the operation and maintenance of the Wastewater Works whether for interference with aboriginal and treaty rights, negligence, nuisance, interference with riparian rights, causing damage under the rule in *Rylands v. Fletcher*, breach of contract, negligent or fraudulent misrepresentation or such other claims as may appear just on the evidence, the Plaintiffs say that the Province is vicariously liable as a

landlord for injury, loss and damage occasioned by the Lessee Defendants, when it knew or ought to have known that the Lessee Defendants intended to use the Wastewater Works in such a way as to give rise to the said claims.

### **Peace of Mind Agreements**

128. The Plaintiffs say that the treaties, agreements and contracts referred to herein were intended by the parties thereto to provide the Pictou Landing First Nation with peace of mind and the parties contemplated that the breach of same would lead to mental suffering and anguish on the part of members of the Pictou Landing First Nation.

### **Fiduciary Duty and Utmost Good Faith**

129. The Province at all times owed the Plaintiffs a fiduciary duty to act honourably and with the utmost good faith in its dealings with the Plaintiffs, including the duty to advise Pictou Landing First Nation in a timely manner of any action being contemplated by the Province which could adversely impact the interests of the Pictou Landing First Nation, the duty to fully disclose relevant information in its possession to the Plaintiffs so that the Plaintiffs could make informed decisions in respect of the contemplated uses of A'Se'K, the duty to be honest and forthright in its dealings with the Pictou Landing First Nation, the duty not to make arbitrary decisions and the duty to provide reasons for any decision which could have a material impact on the Pictou Landing First Nation. The Plaintiffs repeat the facts recited herein and say that the Province has breached its fiduciary duty, has failed to act honourably and has acted in bad faith throughout.

**Loss and Damage**

130. The Plaintiffs have suffered loss and damage as a result of the above including, but not limited to:

- (a) loss of the use and enjoyment of land;
- (b) loss of riparian rights;
- (c) loss of ability to harvest fish in or near A'Se'K due to total destruction of the shellfish and fish habitat in and near A'Se'K;
- (d) loss of navigational rights;
- (e) loss of a preferred mooring place for fishing and other vessels which forced some Pictou Landing First Nation fishermen to abandon commercial fishing due to a lack of alternative places to safely moor boats;
- (f) loss of recreational rights in and around A'Se'K and Lighthouse Beach;
- (g) loss of economic opportunities including opportunities arising (i) from the Plaintiffs' right to harvest and sell or trade fish as part of their treaty and aboriginal rights; (ii) from the location of the community next to Lighthouse Beach; and (iii) from the potential for land development;
- (h) diminution in land values;
- (i) loss of culturally significant natural resources including A'Se'K and the Burying Grounds;
- (j) loss of cultural identity;
- (k) loss of independence;
- (l) mental anguish;
- (m) personal injury or risk of personal injury from exposure to toxic chemicals from the wastewater; and

(n) anxiety, stress and worry due to the unknown effects of living next to toxic wastewater and inhaling contaminated air.

131. The Defendants have wrongfully received revenues from the unjustified infringement of the Plaintiffs' rights. In addition the Defendants have saved hundreds of millions of dollars by failing to make alternative arrangements for the discharge of wastewater in a manner that would not interfere with the rights of the Pictou Landing First Nation.

### **Legislation**

132. The Plaintiffs plead and rely upon the following constitutional and legislative enactments and their predecessors and any amendments:

- (a) the *Indian Act*, R.S.C. 1985, c. I-5;
- (b) the *Constitution Act, 1867*;
- (c) the *Constitution Act, 1982*;
- (d) the Royal Proclamation of 1761;
- (e) the Royal Proclamation of 1763;
- (f) the *Environment Act*, S.N.S. 1994-95, c.1;
- (g) the *Human Rights Act*, R.S.N.S. 1989, c. 214; and
- (h) other legislative enactments to be specified by legal counsel for the Plaintiffs.

### **RELIEF SOUGHT**

133. The Plaintiffs claim an order providing the following remedies against the Defendants:

**Declarations as to Aboriginal and Treaty Rights**

- (a) A declaration that the Pictou Landing First Nation has had since 1966 and continues to have an un-extinguished aboriginal and treaty right to reside on I. R. No. 24 free from airborne contaminants, including but not limited to sulphur compounds and mercaptins, which adversely affect the use and enjoyment of I. R. No. 24.
- (b) A declaration that the Pictou Landing First Nation has had since 1966 and continues to have an un-extinguished aboriginal and treaty right to reside on I. R. No. 24 free from industrial noises which adversely affect the use and enjoyment of I. R. No. 24.
- (c) A declaration that the Pictou Landing First Nation has had since 1966 and continues to have an un-extinguished aboriginal and treaty right to use and enjoy the waters of A'Se'K in their natural state.
- (d) A declaration that the Pictou Landing First Nation has had since 1966 and continues to have an un-extinguished aboriginal and treaty right to maintain and protect the fish habitat in A'Se'K, in the channel leading from A'Se'K to the Northumberland Strait and in the Northumberland Strait adjacent I. R. No. 24.
- (e) A declaration that the Pictou Landing First Nation has had since 1966 and continues to have an un-extinguished aboriginal or treaty right to maintain and protect the shellfish habitat in and around A'Se'K, in and around the channel leading from A'Se'K to the Northumberland Strait and in and around the Northumberland Strait adjacent I. R. No. 24.
- (f) A declaration that the Pictou Landing First Nation has had since 1966 and continues to have an un-extinguished aboriginal and treaty right to use and enjoy the waters of the Northumberland Strait adjacent to I. R. No. 24 in their natural state.



(g) A declaration that the Pictou Landing First Nation has had since 1966 and continues to have an un-extinguished aboriginal or treaty right to navigate in the waters of A'Se'K including the right to access A'Se'K by boat from the Northumberland Strait.

(h) A declaration that the Pictou Landing First Nation has had since 1966 and continues to have un-extinguished aboriginal title to the Burying Grounds.

(i) In the alternative, a declaration as to the aboriginal and treaty rights of the Pictou Landing First Nation in and to the Burying Grounds since 1966.

#### **Declarations as to Riparian and Littoral Rights**

(j) A declaration that the Pictou landing First Nation has had since 1966 and continues to have riparian rights in and to the waters of A'Se'K.

(k) A declaration that the Pictou landing First Nation has had since 1966 and continues to have littoral rights in and to the waters of the Northumberland Strait adjacent I. R. No. 24.

#### **Declaration as to Transfer of Riparian Rights in 1966**

(l) A declaration that the purported transfer of riparian rights in and to the waters of A'Se'K to the Province in 1966 is void *ab initio* and is of no force and effect as: (i) it failed to comply with the provisions of the *Indian Act*, the Royal Proclamation of 1761 and the Royal Proclamation of 1763; (ii) it was undertaken on the basis of fraudulent or negligent misrepresentations by the Province; (iii) it was undertaken on the basis of a mutual, common or unilateral mistaken belief that the wastewater project to be undertaken by the Province could be undertaken without adversely affecting the use and enjoyment of I. R. No. 24; (iv) the Province, as a fiduciary, deceived the Pictou Landing First Nation; (v) the Province has acted in bad

faith in performing its obligations under the transfer; and/or (vi) it was an unconscionable transaction.

**Declarations as to Contractual Obligations**

(m) In the alternative, if the transfer of riparian rights in and to the waters of A'Se'K to the Province in 1966 is not void *ab initio*, a declaration that it was a term of the transfer, or a term of a contract collateral to the transfer agreement, that the Province would not allow conditions in A'Se'K to adversely impact the use and enjoyment of I. R. No. 24 by the Pictou Landing First Nation, would remedy any septic conditions that arose in A'Se'K and would build a slipway for boats to enter and leave A'Se'K.

(n) A declaration that the promises by the Province in 1991 and 1992 to end the discharge of wastewater into A'Se'K and thereafter to remediate A'Se'K and return it to its natural state at the end of the Wastewater Agreement amounted to a binding contract collateral to the 1993 settlement agreement with Canada.

(o) A declaration that the MOU is void *ab initio* and is of no force and effect as: (i) it failed to comply with the provisions of the *Indian Act*, the Royal Proclamation of 1761 and the Royal Proclamation of 1763; (ii) it was undertaken on the basis of fraudulent or negligent misrepresentations by the Province and Kimberly Clark Inc. as to the feasibility of the Pipeline Project; (iii) it was undertaken on the basis of a mutual, common or unilateral mistaken belief that the Pipeline Project could be carried in compliance with applicable environmental laws; (iv) Kimberly Clark Inc. and its assigns acted in bad faith in performing their obligations under the MOU; and/or (v) it was an unconscionable transaction.

(p) A declaration that the promise by the Province to end the discharge of wastewater into A'Se'K and thereafter to remediate A'Se'K and return it to its natural state within a reasonable period of time after December 31, 2008 and to compensate the Pictou Landing First Nation for the adverse impacts associated with wastewater in

A'Se'K until such time as remediation was complete, amounted to a binding contract collateral to the 2009 forbearance agreement with Northern Pulp.

**Declarations as to the Duty to Consult and Accommodate**

(q) A declaration that the Province has since 1966 owed and still owes the Pictou Landing First Nation a duty to consult with the Pictou Landing First Nation and, if indicated, accommodate the interests of the Pictou Landing First Nation in respect of all of its decisions and actions, when it recognized or ought to have a recognized that the decision or action could adversely affect the claimed or established aboriginal and treaty rights of the Pictou Landing First Nation.

(r) A declaration that in consulting with and accommodating the interests of the Pictou Landing First Nation, the Province had and has a duty to take into account, among other things:

- i. the cumulative effect of government decisions and actions over time;
- ii. the failure of the Province to set apart any land for the benefit of the ancestors of the Pictou Landing First Nation in and around A'Se'K when granting lands to settlers in the 1700's;
- iii. the failure of the Province to set apart and protect the Burying Grounds for the benefit of the ancestors of the Pictou Landing First Nation since the 1700's;
- iv. the fact that despite the Crown grants to settlers the ancestors of the Pictou Landing First Nation continued to occupy, hunt, fish, gather and harvest on lands around A'Se'K for nearly 100 years after the settlers arrived until land was finally set apart for them;
- v. the failure of the Province to set apart an adequate amount of land when 50 acres was finally set apart in 1866;
- vi. the fact that all reserve lands were purchased with "Indian money" and were not a "gift" from the Crown;

- vii. the inability of the lands set apart for the Pictou landing First Nation to provide sufficient natural resources to sustain the Pictou Landing First Nation at even a subsistence level;
- viii. the dependence of the Pictou Landing First Nation on the Crown for support;
- ix. the lack of any economic benefits from the operation of the Mill or the facilities at A'Se'K;
- x. the fact that the Pictou Landing First Nation have no other lands on which to reside due the pattern of land development permitted by the Province;
- xi. the expense, inconvenience and social costs of relocating the community or mitigating against the adverse effects of the wastewater in A'Se'K;
- xii. the historical and spiritual connection of the Pictou Landing First Nation to A'Se'K;
- xiii. the fact that Pictou Landing First Nation were limited as to where they could fish, hunt and trap by government regulation and the granting of land;
- xiv. the social impact of large scale industrial projects on aboriginal communities;
- xv. the social impact of government sponsored environmental contamination on communities;
- xvi. the lack of scientific understanding of the long term effects of environmental contaminants on the health of people exposed to them;
- xvii. the difficulty of establishing actual harm from environmental contamination;
- xviii. the known risks associated with environmental contamination;
- xix. the polluter pays principle;
- xx. the precautionary principle requiring that where there are threats of serious or irreversible damage, the lack of full scientific certainty shall not be used as a reason for postponing measures to prevent environmental degradation,;

xxi. the rights of aboriginal people as protected by the Nova Scotia *Human Rights Act*, the *Canadian Charter of Rights and Freedoms*, the *Constitution Act, 1982*, international law governing the recognition and protection of the rights of indigenous peoples, the Royal Proclamations of 1761 and 1763 and the assurances provided by Chief Justice Belcher.

(s) A declaration that the Province had, and where applicable continues to have, a duty to consult and, if indicated, accommodate the interests of the Pictou Landing First Nation with respect to:

- i. the selection of A'Se'K as the receiving waters for wastewater from the Mill;
- ii. the design and construction of the dams, the primary settling lagoon and the secondary lagoon;
- iii. the selection of the pipeline route;
- iv. the construction of the pipeline through the Burying Grounds;
- v. the design and construction of a ditch across I. R. No. 37;
- vi. the discharge of wastewater into a ditch on I. R. No. 37;
- vii. the regulation of water levels in A'Se'K;
- viii. the flooding of I. R. No. 24, I. R. No. 24G and I. R. No. 37;
- ix. the refusal to build a slipway at the channel leading to A'Se'K from the Northumberland Strait;
- x. the Wastewater Agreement of 1970;
- xi. the design and construction of modifications to the wastewater facilities at A'Se'K including the replacement of the primary settling lagoon with two primary settling ponds, the creation of the ASB; the installation of mechanical aerators;
- xii. the operation of the wastewater facilities;
- xiii. the extension of the Wastewater Agreement in 1995;
- xiv. the Lease;
- xv. the Licence;

- xvi. the operating approval for the Mill and the wastewater facilities at A'Se'K issued under the *Environment Act* including any alteration or renewal thereof;
- xvii. the approval of the transfer of the Mill and the assignment of the Lease and the Licence from Scott Maritimes to Kimberly Clark;
- xviii. the lease extension agreement of 2002;
- xix. the approval of the transfer of the Mill and the assignment of the Lease and Licence from Kimberly Clark to Neenah Paper;
- xx. the decision to allow Neenah Paper to continue to discharge wastewater into A'Se'K after the Licence expired on December 31, 2005;
- xxi. the decision to extend the Licence on a month-to-month basis in May 2008;
- xxii. the ongoing decision since May 2008 not to cancel the month-to-month Licence;
- xxiii. the ongoing decision not to implement the commitments made in 1966, 1991, 1992 and 1995 to stop the discharge of wastewater into A'Se'K and thereafter to remediate it;
- xxiv. the on going decision not to proceed with the accommodation of the aboriginal and treaty rights of the Pictou Landing First Nation as decided and promised to the Pictou Landing First Nation as set out in the December 4, 2008 letter; and
- xxv. the decision to provide funding to Northern Pulp in the Land Deal.

(t) A declaration that the Province is under a continuing duty to consult and accommodate the interests of the Pictou Landing First Nation, despite the institution of the within proceedings, including a duty to consult and accommodate in regard to:

- i. the ongoing decision whether to terminate the month-to-month Licence;
- ii. changes to the terms and conditions of the month-to-month Licence, the Lease, the operating approval under the *Environment Act* and any other licence, permit or approval associated with the Mill, the pipeline or the wastewater treatment facilities at A'Se'K;

- iii. the ongoing decision whether or not to prevent the discharge of wastewater into A'Se'K;
- iv. the ongoing decision whether or not to monitor the environmental and health impacts of the wastewater in A'Se'K;
- v. a decision whether or not to enforce any rights under the month-to-month Licence, the Lease, the operating approval under the *Environment Act* and any other licence, permit, approval, statutory, common law or equitable right associated with the Mill, the pipeline or the wastewater treatment facilities at A'Se'K;
- vi. the selection, planning, design and construction of any alternative location or facility for the discharge of wastewater from the Mill into the waters of the Northumberland Strait;
- vii. the remediation of A'Se'K;
- viii. the return of A'Se'K to its natural state;
- ix. any changes to or enforcement of any loan or other agreement associated with the Land Deal; and
- x. any other decision concerning the operations of the Mill or the discharge of wastewater from the Mill as long as wastewater continues to be discharged into A'Se'K or into the waters of the Northumberland Strait so as to interfere with the aboriginal and treaty rights of the Pictou Landing First Nation.

**Declarations as to Violation of Aboriginal, Treaty, Common Law, Contractual and Other Rights**

(u) A declaration that the Defendants, or such of them as appears from the evidence, have violated and interfered with the aboriginal and treaty rights of the Pictou Landing First Nation to occupy, hunt, fish, gather and harvest, to use and enjoy the lands set apart for them and to use and enjoy the waters of A'Se'K and the Northumberland Strait in their natural state, by:

- i. building dams and introducing mechanical and other engineered structures in A'Se'K to alter the natural state of A'Se'K;

- ii. constructing a pipeline through the Burying Grounds;
- iii. constructing a ditch across I. R. No. 37;
- iv. permitting wastewater containing toxins and other chemicals and organic matter from the Mill to be discharged onto I. R. No. 37;
- v. permitting wastewater containing toxins and other chemicals and organic matter from the Mill to be discharged into A'Se'K beginning in 1967;
- vi. permitting wastewater containing toxins and other chemicals and organic matter from the Mill to be discharged into the Northumberland Strait;
- vii. permitting wastewater containing toxins and other chemicals and organic matter from the Mill to flood portions of I. R. No. 24, I. R. No. 24G and I. R. No. 37;
- viii. allowing noxious gasses to escape from the wastewater and contaminant the air on I. R. No. 24 and other lands set apart for the Pictou Landing First Nation;
- ix. destroying of the fish and shellfish habitat in and around A'Se'K and the Northumberland Strait including in the channel leading to the Northumberland Strait.

(v) A declaration that the Defendants, or such of them as appears from the evidence, have trespassed on I. R. No. 24, I. R. No. 24G, I. R. No. 37 and the Burying Grounds by:

- i. entering upon and constructing a pipeline through the Burying Grounds;
- ii. entering upon and constructing a ditch across I. R. No. 37; and
- iii. flooding I. R. No. 24, I. R. No. 24G and I. R. No. 37.

(w) A declaration that the Defendants, or such of them as appears from the evidence, have interfered with the riparian rights of the Pictou Landing First Nation and more particularly, the right to:

- i. navigation in and on A'Se'K and the channel leading from A'Se'K to the Northumberland Strait;



- ii. take fish including shellfish from the waters and bed of A'Se'K; and
- iii. clean water in its natural state for swimming and other recreational uses in A'Se'K.

(x) A declaration that the Defendants, or such of them as appears from the evidence, have interfered with the littoral rights of the Pictou Landing First Nation and more particularly, the right to:

- i. take fish including shellfish from the waters and bed of the Northumberland Strait adjacent I. R. No. 24; and
- ii. clean water in its natural state for swimming and other recreational uses in the Northumberland Strait adjacent I. R. No. 24.

(y) A declaration that the Defendants, or such of them as appears from the evidence, are liable for damage caused by the escape of wastewater from the Mill under the rule in *Rhylands v. Fletcher*.

(z) A declaration that the Province fundamentally breached the transfer of riparian rights agreement of 1966 and the same is rescinded.

(aa) A declaration that the Province has breached the collateral contracts of 1992 and 1993.

(bb) A declaration the MOU has been rescinded.

(cc) A declaration that the Province has breached the collateral contract contained in the letter of December 4, 2008.

**Declarations as to Violation of Equitable Rights**

(dd) A declaration that the Province breached its fiduciary duties to the Pictou Landing First Nation in respect of the wastewater operations at A'Se'K.

(ee) A declaration that the Province breached its duty to consult with and accommodate the Pictou Landing First Nation in respect of the wastewater operations at A'Se'K.

(ff) A declaration that the Province breached its duty to act with the utmost good faith and in an honourable way in its dealings with Pictou Landing First Nation in respect of the wastewater operations at A'Se'K.

**Declarations as to Relief**

(gg) An interim and permanent injunction restraining Northern Pulp from discharging wastewater into A'Se'K including into the settling ponds, the ASB and the finishing pond.

(hh) An interim and permanent injunction restraining Northern Pulp from discharging wastewater into the Northumberland Strait so as to contaminate the waters adjacent I. R. No. 24.

(ii) A declaration that the Burying Grounds are owned by Canada for the benefit of the Pictou Landing First Nation.

(jj) A declaration that neither the Province nor Northern Pulp have an interest in the Burying Grounds and that the Lease is void in so far as it purports to grant an interest in the Burying Grounds.

(kk) An interim and permanent injunction restraining Northern Pulp and/or the Province from discharging wastewater through that section of the pipeline which passes through the Burying Grounds.

(ll) A mandatory injunction and order requiring Northern Pulp and/or the Province to remove the pipeline from the Burying Grounds and to restore the Burying Grounds to their natural state free of contamination.

(mm) An order quashing the month-to-month Licence.

(nn) An order requiring the Province to take immediate steps to prevent the continued discharge of wastewater into A'Se'K.

(oo) An order requiring the Province to consult with and accommodate the Pictou Landing First Nation and an order that any Party may apply to this Court for further directions, advice or orders in respect of the conduct of the consultation and the substance of the accommodation required;

(pp) An order that the Defendants develop and implement a remediation plan in consultation with the Plaintiffs to remediate damage caused to A'Se'K, I. R. No. 24, I. R. No 24G and I. R. No. 37 and to restore A'Se'K to its natural state.

(qq) A declaration that each of the Defendants has wrongfully received revenues from the unjustified infringement of the aboriginal, treaty and other rights of the Plaintiffs, and holds these revenues as a constructive trustee for the Plaintiffs, and an order for each of the Defendants to provide an accounting of all revenues received in relation to wastewater operations at A'Se'K and to disgorge all of those revenues, with interest, to the Plaintiffs.

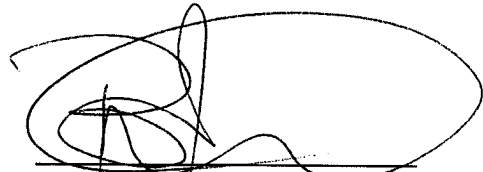
(rr) A declaration against the Province as to the quantum of general, special, aggravated and punitive damages and equitable compensation.

(ss) Judgment against all other Defendants for general, special, aggravated and punitive damages and equitable compensation.

- (tt) Costs on a solicitor and own client basis including advanced costs.
- (uu) Prejudgment interest.
- (vv) Such further and other relief as this Honourable Court deems just.

**Signature**

Signed at Halifax, this 9th day of September 2010.



**BRIAN J. HEBERT**  
Wickwire Holm  
2100-1801 Hollis Street  
P. O. Box 1054  
Halifax, NS B3J 2X6  
Tel. 429-4111  
Fax: 429-8215

Counsel for the Plaintiffs

**TO:** The Attorney General for the Province of Nova Scotia  
**AND TO:** Northern Pulp Nova Scotia Corporation  
**AND TO:** Neenah Paper Company of Canada  
**AND TO:** Kimberly Clark Inc.  
**AND TO:** Kimberly Clark Nova Scotia Incorporated