

**PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** *R. v. Northern Pulp Nova Scotia Corporation*, 2016 NSPC 29

**Date:** 2016-05-11

**Docket:** 2902618

**Registry:** Pictou

**Between:**

Her Majesty the Queen

v.

Northern Pulp Nova Scotia Corporation

***SENTENCING DECISION***

**Judge:** The Honourable Judge Del W. Atwood

**Heard:** 11 May 2016 in Pictou, Nova Scotia

**Charge:** Sub-sections 36(3) & 40(2) of the Fisheries Act

**Counsel:** Paul Adams for the Public Prosecution Service of Canada  
Harvey L. Morrison Q.C. for Northern Pulp Nova Scotia  
Corporation

**By the Court:**

[1] The first element of truth and reconciliation is truth. The undeniable truth is that the experience of the Pictou Landing First Nation has been one of subjugation and suppression under the Canadian federation. It shares this history with the other First Nations of Canada, as described succinctly in the *Report of the Truth and Reconciliation Commission of Canada*.<sup>1</sup> An instance of that injustice was the manner in which a pulp mill came to be located at Abercrombie Point in Pictou County fifty years ago; along with the mill was built an effluent-treatment plant in Boat Harbour. This case has to do with an escape of effluent from a pipeline which runs from the mill to the plant. The owner and operator of those facilities today is Northern Pulp Nova Scotia Corporation,

[2] On 20 January 2016, Northern Pulp Nova Scotia Corporation pleaded guilty to unlawfully depositing or permitting the deposit of a deleterious substance, namely pulp and paper effluent, in water frequented by fish, or in any place under conditions where the deleterious substance may enter such water, contrary to subsection 36(3) of the *Fisheries Act*; as a result, Northern Pulp committed an

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<sup>1</sup> Canada, Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: The Commission, 2015) at 1-6.

offense contrary to subsection 40 (2) of the *Fisheries Act*. The prosecution elected to proceed summarily. The penalty for this offence is set out in sub-para.

40(2)(b)(ii) of the *Act*:

...

(ii) in the case of a person, other than an individual or a corporation referred to in subparagraph (iii),

(A) for a first offence, to a fine of not less than \$100,000 and not more than \$4,000,000, and

...

[3] Counsel submitted an agreed statement of fact in support of a finding of guilt. Much as an admission, an agreed statement is forensically conclusive of the facts set out in it.<sup>2</sup>

### ***Northern Pulp Nova Scotia's control of the effluent pipeline***

[4] The statement of fact informed the court that Northern Pulp was at all material times the owner and operator of a pulp-and-paper mill located in Abercrombie, Nova Scotia. Pursuant to a registered lease agreement with the Province of Nova Scotia, Northern Pulp is responsible for the operation and maintenance of an effluent-treatment facility and a 3.6 kilometre-length pipeline that

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<sup>2</sup> *R. v. Falconer*, 2016 NSCA 22 at para. 45.

carries untreated pulp-and-paper effluent from the Northern Pulp mill to an effluent-treatment facility located in nearby Pictou Landing, Nova Scotia.

***Uncontrolled effluent escape***

[5] On 10 June 2014, at approximately 7:00 a.m., Northern Pulp personnel determined that no effluent was reaching the effluent-treatment facility at Pictou Landing through the effluent pipeline. An order to initiate shutdown of the pulp-and-paper mill was given very shortly thereafter. At approximately 7:40 a.m., Northern Pulp personnel located a break in the pipeline on the Pictou Landing side of the East River, approximately 110 m from the East River, Pictou Harbor Shoreline. Untreated pulp and paper effluent flowed from the pipeline break into a wetland area where it pooled before discharging into the adjacent East River/Pictou Harbor. An effluent plume extended into the East River.

[6] I was informed that Northern Pulp reported the effluent discharge promptly to Environment Canada and Nova Scotia Environment.

***Investigation reveals 47-million litre effluent escape***

The investigation carried out by those regulatory agencies determined that a rupture in the effluent-discharge pipeline had resulted in the uncontrolled release of an estimated 47,000, 000 litres of untreated effluent into the surrounding

environment. The agreed statement of fact recited that Northern Pulp took remedial action as soon as possible to control and contain the discharged effluent. However, beginning on 10 June and continuing into 11 June 2014, a significant portion of the released untreated pulp-and-paper effluent was deposited into the adjacent East River/Pictou Harbour.

### ***Pipeline deterioration***

[7] The effluent pipeline was described in the agreed statement as being thirty-six inches in diameter and made of fibreglass-reinforced plastic. It was constructed in multiple layers, including a corrosion liner and structural-filament-wound fibreglass. Inspection revealed that the effluent pipeline was in an advanced stage of deterioration at the rupture site. A five-foot section of the pipeline at that location had become completely delaminated, and layers of the pipeline had separated, reducing the pipeline's pressure-bearing strength. There were visible cracks, leaks, and extensive erosion of the pipeline at the rupture site. A fourteen-inch oval hole was discovered at the bottom of the pipeline where the discharge occurred.

[8] Northern Pulp had an effluent-pipeline-inspection plan in place at the time of the effluent escape; however, there had not been an internal inspection of the land-based portion of the pipeline (which included the section where the pipeline-

surface rupture occurred) since Northern Pulp had assumed responsibility for the operation and maintenance of the effluent pipeline and treatment facility in 2008 — this despite there having been several leaks that had required repair or replacement of sections of the pipeline in previous years. Regular external inspections of the pipeline had been done prior to the 10 June rupture.

***Sampling of contaminated areas and toxicity analysis***

[9] On 10 and 11 June 2014, Northern Pulp personnel collected samples of the untreated effluent from locations where it had escaped into the adjacent East River/Pictou Harbour, as required by the applicable *Pulp and Paper Effluent Regulations*.<sup>3</sup> Environment Canada investigators collected samples of the untreated effluent on 11 June 2014.

[10] The effluent samples collected by Northern Pulp were submitted to an accredited laboratory, Harris Industrial Testing Services Ltd., for toxicity evaluation. The tests were conducted in accordance with Environment Canada's test methods as prescribed in the *Pulp and Paper Effluent Regulations*. The toxicity testing of the samples determined that they were acutely lethal to fish.

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<sup>3</sup> SOR/92-269.

[11] The effluent samples collected by Environment Canada personnel on 11 June 2014 were submitted to Environment Canada's accredited Atlantic Laboratory for Environmental Testing for toxicity analysis. Again, the testing was conducted in accordance with the test method prescribed in the *Pulp and Paper Effluent Regulations*. The analysis of the Environment Canada samples determined they were not acutely lethal to fish; however, they were found to have an elevated pH value of 10.04. Exposure to pH values greater than 9.0 is known to have various sub-lethal toxic effects on fish, including problems with reduced feeding, decreased growth and reproduction, and increased susceptibility to other environmental stressors.

[12] As such, the untreated pulp and paper effluent deposited into the East River/Pictou Harbour constituted a "deleterious substance" as defined in sub-section 34(1) of the *Fisheries Act*:

34 (1) For the purposes of sections 35 to 43,

deleterious substance means

(a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water, or

(b) any water that contains a substance in such quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water,

and without limiting the generality of the foregoing includes

(c) any substance or class of substances prescribed pursuant to paragraph (2)(a),

(d) any water that contains any substance or class of substances in a quantity or concentration that is equal to or in excess of a quantity or concentration prescribed in respect of that substance or class of substances pursuant to paragraph (2)(b), and

(e) any water that has been subjected to a treatment, process or change prescribed pursuant to paragraph (2)(c); (*substance nocive*)

...<sup>4</sup>

### ***A prized fish habitat***

[13] The East River/Pictou Harbour into which this significant escape of untreated pulp and paper effluent flowed constitutes "water frequented by fish" as defined in sub-s. 34(1) of the *Fisheries Act*.

[14] The East River/Pictou Harbour is known as a highly productive fish habitat which supports a variety of fish species, including oysters, clams, mackerel, herring, Atlantic salmon, striped bass, and brown trout.

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<sup>4</sup> R.S.C. , c. F-14, s. 34.

[15] The agreed statement informed the court that there was no overt indication of environmental harm to the impacted fish habitat as a result of the deposit of untreated effluent into the East River/Pictou Harbour, and no dead fish were observed. Northern Pulp's environmental consultant reported on 29 September 2014 that testing of ground and surface water in August and September had revealed that the escape did not appear to represent an ecological concern.

***Remedial steps taken by Northern Pulp***

[16] On 11 June 2014, Environment Canada issued a verbal inspector's direction pursuant to sub-s. 38(7.1) of the *Fisheries Act* requiring Northern Pulp to take remedial measures in relation to the effluent contamination; those included stopping the deposit of untreated effluent, cleaning up any remaining effluent in the affected area, retaining an environmental consultant to advise on an appropriate remedial plan, and the implementation of the resulting plan. In fact, Northern Pulp had initiated remedial measures on 10 June 2014, prior to the issuance of the inspector's direction. Northern Pulp complied fully with the conditions of the inspector's verbal direction, as well as with a later written direction issued on 20 June 2014.

[17] Immediately following its detection of the escape, Northern Pulp retained a qualified environmental consulting firm to recommend and implement a remedial

action plan. Initial actions taken by Northern Pulp under this plan included placing sandbags in areas where effluent was observed discharging into the East River/Pictou Harbour, and the installation of silt curtains in the affected areas.

[18] Vacuum-pumper trucks were deployed to remove pooling effluent and water from the area; this was done to prevent additional discharge into the East River/Pictou Harbour. The pumping operation ran from 11 to 21 June 2014; during that time, a volume of approximately 2.2 million litres of effluent and water was evacuated and removed. The cost to Northern Pulp for environmental analysis, consulting fees, and the removal of effluent was in excess of \$240,000.

[19] The section of the pipeline where the rupture occurred was replaced fully and reinforced. In addition, an internal inspection of the effluent pipeline was conducted and repairs were completed to other areas of concern identified during the inspection in order to prevent a recurrence of effluent escape. Defence counsel advised the court during the sentencing hearing that Northern Pulp spent in the vicinity of \$400,000 to repair the pipeline.

[20] Northern Pulp cooperated fully with the Environment Canada investigation.

***Impact upon the Pictou Landing First Nation***

[21] Consistent with its obligation inherent in the honour of the Crown,<sup>5</sup> and recognizing the importance of rebuilding the Crown's relationship with Aboriginal peoples in Canada,<sup>6</sup> the prosecution undertook, at the request of the court, a consultation with the Pictou Landing First Nation as to the impact of this very serious environmental offence upon that community. As a separate and equal branch of government, the court shares the obligation to consult; given the limited resources available to it, the court depends upon the executive branch of government to provide the resources necessary to allow the court to fulfil its various constitutional roles in a manner consistent with an independent judiciary. I am grateful to Mr. Adams for his assistance to the court.

[22] That consultation led to the presentation to the court by Chief Andrea Paul of the Pictou Landing First Nation of a comprehensive statement of community impact.

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<sup>5</sup>See *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 16-38.

<sup>6</sup>See Canada. Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength*, vol. 3, (Ottawa: The Commission, 1996), *passim*.

[23] As in any hearing before a statutory court, there are limits to the nature of evidence I might receive in rendering a decision. First of all, I recognize that there is no provision in the *Fisheries Act* for the reception of community-impact evidence; while the *Act* incorporates by reference certain procedural provisions of the *Criminal Code*, it does not take in s. 722 of the *Code* which deals with impact statements. Nevertheless, community impact is a relevant sentencing consideration in environmental-offence cases.<sup>7</sup> The consultation process that was followed here—which afforded the community the opportunity to meet and discuss what they had experienced, and allowed the chief of the First Nation to summarize in writing what had been witnessed by the members of her community—offered the court evidence relevant evidence that was entirely credible and trustworthy.

[24] Counsel drew to the court's attention that some of the content of the statement of community impact entered into areas of legal history that would not be admissible ordinarily without a more formal hearing.

[25] In my view, while the historical account in Chief Paul's statement might extend beyond what counsel assert is admissible, the truth of the damaging impact that the pulp mill at Abercrombie Point and its toxic effluent-treatment site at Boat

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<sup>7</sup> See, e.g., *R. v. B. Cusano Contracting Inc.*, 2011 BCPC 348 at paras. 81-91.

Harbour has had on the well-being of the Pictou Landing First Nation—and continues to have— is so conspicuous and notorious as to be beyond dispute.<sup>8</sup>

Even if certain particular points of that history might not fall within the scope of what the court might notice judicially, there is no doubt in my mind about the impact this offence had upon the Pictou Landing First Nation community; Chief Paul began the community's statement by summarizing it:

This was not a victimless offence. The discharge of effluent from a leak in the 50-year-old pipeline on June 10, 2014 was simply the latest environmental insult to the traditional territory of the Pictou Landing First Nation,

We will never know the actual impact that the deposit of 4 million litres of toxic effluent into the East River that day has had or will have on fish and fish habitat, We do know that the social, psychological and cultural impact on the members of our community was intense and will persist.

The spill triggered anger and fear which can only be understood as part of the decades-long environmental degradation of our territory which began with the construction in 1967 of a pipeline to carry effluent from the new pulp mill at Abercrombie Point. The pipeline was routed across lands over which our First Nation has asserted a compelling claim for Aboriginal title. This land was never the subject of a Crown grant but somehow became the subject of private deeds exchanged between settlers in the area.

[26] Chief Paul described the community consultation which allowed members of the Pictou Landing First Nation to discuss openly the powerful effect this toxic spill had on them:

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<sup>8</sup> A brief summary of that grim history is set out in the ground-breaking work by Daniel N. Paul, *We Were Not The Savages*, 3d ed. (Halifax: Fernwood Publishing, 2006) at 240-9. *And see R. v. R.D.S.*, [1997] 3 S.C.R. 484 on the sorts of extrinsic but conspicuous facts which a court is entitled to know.

We recently gathered on February 16, 2016 at a community meeting to talk about the impact of the effluent spill so that we could better prepare this statement. As Mi'kmaq we look at the world as four parts of a complete circle. The four parts represent the physical, the mental, the spiritual and the emotional. The impact of the 2014 pipeline leak has affected all four areas and was captured on a circle diagram made during the community meeting.

The community members reported having been afraid of contamination in the river. They felt like victims all over again. They felt like they had let the environment down. They felt helpless. The Province has propped up the mill for so many years and still owns the pipeline. No charges were ever laid by the Province against Northern Pulp under the Environment Act or otherwise. They questioned why Northern Pulp was not held responsible. They asked why Northern Pulp was not required to replace the entire pipeline in the area of Indian Cross Point. They worry that another leak could occur again.

[27] Furthermore, as Chief Paul stated:

As the news spread throughout the community, there was concern about destruction of the burial grounds and contamination of the river. Our community is downstream from Indian Cross Point at the mouth of the East River.

The community has large commercial fishery operation as well as a food and ceremonial fishery. The spill occurred in the middle of lobster season. While there were no traps in the immediate area, there was concern about the impact on the lobster fishery further out to sea.

The spill put Indian Cross Point back in the spotlight and reminded the community that the pipeline had been unlawfully buried at Indian Cross Point without our consent. We considered it as part of our territory even though it had not been formally recognized at the time.

The spill also sparked outrage in the community because it was so closely connected to the Boat Harbour treatment facility. Band Council organized a blockade of the right of way leading to the spill site. The blockade had the full support of the community and members took turns at the blockade. The community received support from the broader community but also received threatening messages as well. Some Pictou Landing First Nation members feared that closure of the mill might be blamed on them.

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

On a positive note, the community members acknowledged that the spill led to a blockade which shut down the mill for two weeks. While the mill was closed the community felt relief. The air pollution from the mill had stopped and the odours from Boat Harbour were not as strong as they had been. Members felt empowered by the blockade and more optimistic about the environment when the mill was closed.

The blockade also led to an agreement in principle with the Province to end the use of the Boat Harbour treatment facility and to remediate Boat Harbour. In March 2015 the Boat Harbour Act was passed which legislates the end of the use of Boat Harbour as an effluent treatment facility as of January 30, 2020.

[29] Generations of injustice wrought by legal, economic, environmental, social, and cultural oppression will not be undone in one day. Reconciliation will be accomplished in steps—some great, some small. It shall require traditional institutions and structures of power to listen to the truths which are fixed indelibly in the minds of elders who have overcome generations of enforced silence and who will be silenced no longer.

[30] Transitional justice—that is, the transition of relationships of authoritarianism into relationships of democracy—requires that witnessed truths be

accompanied by institutional reform, accountability, and reparation linked to enablement.<sup>9</sup>

[31] The Pictou Landing First Nation has spoken the truth; reconciliation will move forward in a small way by this court responding affirmatively to what has been spoken. The joint recommendation of counsel that the court impose upon Northern Pulp a fine of \$225,000.00 is a reasonable one, and is a small but positive step in the course of transition. The Nova Scotia Court of Appeal held in *R. v. McIvor* that a sentencing court ought to depart from a joint recommendation only if its implementation would be contrary to the public interest or bring the administration of justice into disrepute.<sup>10</sup>

[32] The joint recommendation put before the court by Mr. Morrison and Mr. Adams is reasonable: it gives effect to the sliding-scale-of-culpability criterion described in the leading decision of *R. v. Terroco Industries Limited*:<sup>11</sup> this escape of effluent into the environment was not due to an intentional act or reckless misconduct by Northern Pulp. However, it was not what the court in *Terroco* described as a due-diligence near miss; the delaminated condition of the section of

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<sup>9</sup> Courtney Jung, “Walls and Bridges: Competing Agendas in Transitional Justice” in Patrick Macklem & Douglas Sanderson, eds., *From Recognition to Reconciliation* (Toronto: University of Toronto Press, 2016) at 375.

<sup>10</sup> 2003 NSCA 60 at paras. 31-33.

<sup>11</sup> 2005 ABCA 141 at paras. 35-37.

the pipeline that ruptured indicates to me quite strongly that this was an accident waiting to happen, so that I would situate this offence as being midway on the scale of culpability.

[33] The joint recommendation reflects appropriately other factors which the court in *Terroco* identified as being pertinent. Specifically, I have considered the following:

- There was no evidence of Northern Pulp having a prior record for environmental offences;
- Northern Pulp accepted responsibility for its actions by undertaking appropriate remedial steps to lessen the environmental impact of the effluent escape and to prevent a recurrence;
- Although the volume of the toxic effluent release was significant, testing of ground and surface water in August and September revealed that the escape did not represent an ecological concern, so that the damage to the environment did not appear to be long-lasting;
- While the mechanical environmental impact of the effluent escape might have been temporary, the impact upon the sense of safety and security of the Pictou Landing First Nation was profound.

[34] The joint recommendation is a substantial one, and would operate as an effective deterrent. Further, it gives effect to sentence parity; I am able to reach this conclusion based on the extensive list of authorities presented to the court by the prosecution:

- *R. v. Stratbound Minerals Corp.*, (14 October 2015), Bathurst, 04568211 (N.B. Prov. Ct.): prosecution under the *Fisheries Act*; multiple high-volume discharges of mine effluent into water frequented by fish; discharges were intentional and with prior knowledge of potential harm; total fines of \$75,000, including a \$50,000 payment to the Environmental Damages Fund;
- *R. v. West Fraser Timber Co. Ltd.*, (9 April 2009), Kitimat, 26361-1 & 26720-1 (B.C. Prov. Ct.): prosecution under the *Fisheries Act*; 1.96 – million-US-gallon escape of pulp-mill effluent from a ruptured line; fine of \$5,000 and \$60,000 payment to the Habitat Conservation Trust Fund;
- *R. v. Zellstoff Celgar Limited Partnership*, 2012 BCPC 0295: prosecution under Environmental Management Act of British Columbia; three counts involving a total discharge of 500 million litres of effluent in excess of what was allowed by permit; \$10,000 fine on each of three counts, and a \$120,000 payment to a conservation trust;

- *R. v. Teck Metals Ltd.*, (4 November 2013), Rossland, 20723-1 (B.C. Prov. Ct.): prosecution under the *Fisheries Act*; discharge of 350,000 litres of cooling water into a fish habitat; fine of \$10,000 and an additional \$100,000 payment to the Environmental Damages Fund;
- *R. v. Greater Vancouver Regional District*, (4 April 2014), Vancouver, 217720-1: prosecution under the *Fisheries Act*; escape of 650 cubic metres of untreated sewage water into a fish habitat; fine of \$5,000 and a payment of \$105,000 to the Environmental Damages Fund;
- *R. v. Alberta Capital Region Wastewater Commission*, (10 July 2014), Fort Saskatchewan, 131430258P1 (Alta.Prov.Ct.): prosecution under the *Fisheries Act*; escape of 500,000 litres of untreated sewage into the Sturgeon River; fine of \$20,000 and a payment of \$180,000 to the Environmental Damages Fund;
- *R. v. Catalyst Paper Corporation*, (8 December 2015), Powell River, 15468-1 (B.C. Prov. Ct.): prosecution under the *Fisheries Act*; discharge of 5,000,000 of untreated effluent mixed with cooling water; \$5,000 fine for each of three counts and \$185,000 payment to the Environmental Damages Fund;

- *R. v. Shell Canada Limited*, (12 June 2012), Peace River, 101516037P1 (Alta. Prov. Ct.): prosecution under the *Fisheries Act*; release of 12,500 litres of highly toxic oxygen-scavenging liquid into a fish habitat; \$22,500 fine and \$202,500 payment to the Environmental Damages Fund.

[35] The joint recommendation includes a submission that the fine be credited to the Environmental Damages Fund with a proposal that it be distributed as follows:

- \$75,000 to the Mi'Kmaq Conservation Group for purposes related to the conservation and protection of fish or fish habitat or for the restoration of the fish habitat in Pictou County;
- \$75,000 to the Pictou County Rivers Association to be used for purposes related to the conservation and protection of fish or fish habitat or for the restoration of the fish habitat in Pictou County;
- The remaining \$75,000 to eligible recipients to be used for purposes related to the conservation and protection of fish or fish habitat or for the restoration of the fish habitat in Pictou County.

[36] The recommended allocations are also reasonable; however, I believe that the court is able to be more specific in identifying an eligible recipient of the final amount. I believe that this amount should be allocated to the Pictou Landing First

Nation to be used for purposes related to the conservation and protection of fish or fish habitat or the restoration of fish habitat in waters used by the community.

[37] Accordingly, the sentence of the court is that Northern Pulp Nova Scotia Corporation be fined in the amount of \$225,000 to go to the Receiver General in accordance with sub-section 40(6) of the *Fisheries Act*, with the fine to be credited to the Environmental Damages Fund, to be used for purposes related to the conservation and protection of fish or fish habitat or the restoration of fish habitat; pursuant to sub-section 40(7) of the *Fisheries Act*, the court recommends to the federal Minister of the Environment that this amount be distributed from the Environmental Damages Fund as follows:

- \$75,000 to the Mi'Kmaq Conservation Group for purposes related to the conservation and protection of fish or fish habitat or for the restoration of the fish habitat in Pictou County;
- \$75,000 to the Pictou County Rivers Association to be used for purposes related to the conservation and protection of fish or fish habitat or for the restoration of the fish habitat in Pictou County;

- \$75,000 to the Pictou Landing First Nation to be used for purposes related to the conservation and protection of fish or fish habitat or the restoration of fish habitat in waters fished by that community.

[38] In accordance with the statute, these are recommendations only; however, I am confident that they will be given the fullest consideration by the minister.

[39] The fine is to be paid by 30 June 2016.

[40] The court is indebted to counsel for the very complete submissions made to the court, and I am very grateful to the Pictou Landing First Nation for its witness in this case.

**JPC**