



**OFFICE OF THE CONFLICT OF INTEREST COMMISSIONER
PROVINCE OF NEW BRUNSWICK**

**REPORT TO THE SPEAKER
OF THE
LEGISLATIVE ASSEMBLY OF NEW BRUNSWICK
OF THE
INVESTIGATION/INQUIRY**

**BY THE HON. PATRICK A.A. RYAN, Q.C.
CONFLICT OF INTEREST COMMISSIONER**

**INTO ALLEGATIONS BY MR. CLAUDE WILLIAMS,
MLA FOR KENT SOUTH
OF VIOLATIONS OF THE *MEMBERS' CONFLICT OF INTEREST ACT*
BY PREMIER SHAWN MICHAEL GRAHAM, MLA FOR KENT**

Report to the Speaker
of the
Legislative Assembly of New Brunswick
of the
Investigation/Inquiry
by the Hon. Patrick A.A. Ryan, Q.C.
Conflict of Interest Commissioner

Into Allegations by Mr. Claude Williams, MLA
for Kent South
of Violations of the *Members' Conflict of Interest Act*
by Premier Shawn Michael Graham, MLA for Kent

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THE WITNESS LIST AND INQUIRY DATES

Once the investigation of the allegation of a conflict of interest by Premier Graham was turned into an investigation and inquiry caused by the refusal of the Deputy Minister of Business New Brunswick and his counsel from the Office of the Attorney General to produce pertinent documents the inquiry proceeded formally. The following is a schedule of the inquiry dates, the witnesses and a reference to the main thrust of the testimony elicited. Transcript Index Exhibit Book, Part 2.

<u>Date</u>	<u>Witness</u>	<u>Testimony</u>
November 22, 2010	Bill Levesque	Deputy Minister of Business NB: his role in the guarantees.
December 7 & 8, 2010	Bill Levesque	Deputy Minister of Business NB: his role in the guarantees.
December 10, 2010	David Ferguson	Former Clerk of the Executive Council and Secretary of the Cabinet: his role in the guarantees.
December 20, 2010	John Watt	Former Project Executive Officer (Financial Officer) Business NB: Atcon Performance Bond; Atcon ignored contracts; Tozer guarantee; Atcon loans 2009.
December 21, 2010	John Watt	Former Project Executive Officer (Financial Officer) Business NB: New Brunswick companies supposed to get paid; Work on bridge stopped; Ernst & Young study.
January 12, 2011	John Watt	Former Project Executive Officer (Financial Officer) Business NB: Forbearance agreement; Purdy Crawford Committee.
January 28, 2011	Bill Levesque	Deputy Minister of Business NB: Interim decision on inspection of Documents.
January 28, 2011	Byron James	New Clerk of the Executive Council and Secretary of the Cabinet after the 2010 change in government: Records of Decision.

February 3, 2011	Bill Levesque	Deputy Minister of Business NB: The bridge guarantee.
February 28, 2011	Bill Levesque	Deputy Minister of Business NB: Personal guarantee of Robert Tozer; Resignation letter of Alan Graham.
April 5, 2011	David Ferguson	Former Clerk of the Executive Council and Secretary of the Cabinet: Memorandum to Executive Council.
April 5, 2011	Sabrina Noble	Manager of office operations as well as Research and Planning Officer Executive Council Office: Explains executive council documents.
April 5, 2011	Pamela Gagnon	Director of Information Management and Technology Branch, Finance Department: Provides e-mail account system.
April 5, 2011	Donald J. MacTavish	New Brunswick Internal Services Agency, Help desk Analyst, Assisted David Ferguson.
April 8, 2011	Robert Tozer	President and CEO of Atcon.
May 17, 2011	Alan Graham	Director of Vänerply and Atcon Consultant, former Deputy Premier, now federal commissioner.
May 25 & 26, 2011	Shawn Graham	MLA, former Premier.
September 26, 2011	Alan Graham	Director of Vänerply and Atcon Consultant (recalled).

Documents Provided to Inquiry

<u>Date</u>	<u>Briefs</u>	<u>Counsel</u>
December 16, 2010	Brief on Law	Counsel John B.D. Logan, Esq. and Heather Hobart, Esq. Office of the Attorney General

December 17, 2010	Brief on Law	Counsel R. Gary Faloon, Q.C. Counsel on behalf of the Inquiry
August 4, 2011	Brief on Law	Counsel Allison Whitehead, Q.C. on behalf of Shawn Graham
August 10, 2011	Brief	Counsel R. Gary Faloon, Q.C. on behalf of the Inquiry
August 18, 2011	Response to the Aug. 4 Brief of Counsel for Shawn Graham	Counsel R. Gary Faloon, Q.C. on behalf of the Inquiry
October 20, 2011	Brief	Counsel Allison Whitehead, Q.C. on behalf of Shawn Graham
November 30, 2012	RSM Richter Inc. Report re: Atcon Holdings Inc. after the fact Executive Summaries	<u>Exhibit book, Part 2, Tab 60</u>

INTRODUCTORY REMARKS CONCERNING THE ALLEGED BREACH

[1] On April 7, 2010, Claude Williams, then an opposition Member of the Legislative Assembly of New Brunswick for Kent South, filed an affidavit with the Conflict of Interest Commissioner requesting an investigation into certain conduct of the then Premier, the Honourable Shawn Michael Graham. In his affidavit he alleges that the Premier breached section 4 of the *Members' Conflict of Interest Act* by furthering the financial and business interests of the Premier's father, Alan R. Graham.

[2] The matter of the complaint concerns the alleged participation of Premier Graham in the granting by the province of multi-million dollar loan guarantees in 2008 and 2009 in favour of a number of related companies known as the Atcon Group while the Premier's father was a director and consultant to one or more of the related Atcon companies, notably as a director of a company in Sweden called Vanerply AB and a paid consultant to Atcon companies. The principal shareholder and operating mind of all the Atcon related companies is Robert W. Tozer, then a major construction contractor of Miramichi, New Brunswick.

[3] In 2008 the Atcon Group received a loan guarantee for \$13,362,845. In 2009 an application by the Atcon Group for \$50,000,000 financial assistance was consistently rejected at various levels by Business New Brunswick but approved and granted by the Executive Council while the fortunes of Atcon were rapidly deteriorating despite massive financial assistance from the province, ending in the bankruptcy of the Atcon companies.

THE ACT

[4] The pertinent sections of the *Members' Conflict of Interest Act* chapter, M-7.01 SNB 1999 are s. 4 the conflict of interest section applying to all members and being the principal section in play here; s. 13 and s. 15 the procedure to be followed on a conflict of interest at the Executive Council level:

Conflict of interest

4 A member shall not make a decision or participate in making a decision in the execution of his or her office if the member knows or reasonably should know that in the making of the decision there is the opportunity to further the member's private interest or to further another person's private interest.

Procedure on conflict of interest

13 A member who has reasonable grounds to believe that he or she has a conflict of interest in a matter that is before the Assembly or the Executive Council, or a committee of either of them, shall, if present at a meeting considering the matter,

(a) disclose the general nature of the conflict of interest, and

(b) withdraw from the meeting without voting or participating in consideration of the matter.

Procedure on conflict of interest

15 A member of the Executive Council who has reason to believe that he or she has a conflict of interest with respect to a matter that requires that member's decision shall report that possible conflict to the President of the Executive Council and ask the Premier or Deputy Premier to appoint another member of the Executive Council to perform the member's duties in the matter for the purpose of making the decision, and the member who is appointed may act in the matter for the period of time necessary for the purpose.

THE FINANCIAL ASSISTANCE

[5] The Atcon companies and Robert Tozer were not strangers to Business New Brunswick. His companies had come knocking on the provincial government door with

abundant success many times over the years. He was politically colour blind in his unabashed demands for financial assistance from a succession of governments.

[6] The evidence shows a history of considerable financial assistance from government as the Atcon companies grew in importance to the local and regional economy, to the strength of the payrolls, and to an increase in the full-time and part-time employment numbers.

[7] In 2007 Atcon Holdings Inc. claimed to have a payroll of \$76 million; in 2008, \$80 million. By 2009 there were 16 Atcon related companies. The financial structures of the companies collapsed, brought about, among other things, by the inability to meet the burden of an absence of capital. The principal banker at the time of the break down, the Bank of Nova Scotia, was fully secured by Atcon assets and the Province of New Brunswick's multi-million dollar guarantees.

THE INQUIRY PROCESS

[8] In order to cogently follow the proceedings it is necessary to explain the process when a complaint is made against a Member of the Legislative Assembly alleging that the member is in a conflict of interest. This section of my report will explain the mechanical part of the process but not the evidence adduced.

[9] Any person has the right to request an investigation alleging that a member has breached the *Act*. In short, this would ordinarily be referred to as the complaint although the word "complaint" is not used in the legislation.

[10] In order to avoid frivolous, vexatious or bad faith requests or those without merit, the *Members' Conflict of Interest Act* requires that the request for an investigation be in the form of an affidavit. Further, the affidavit must set out the grounds for the person's belief that there is a conflict and describe the nature of the alleged breach of the *Act*.

[11] Once the preliminary steps have been satisfied the Commissioner can proceed with an investigation with or without conducting an inquiry. In the present case the investigation was continued as an inquiry because of the refusal of Business New Brunswick to produce key documents for my inspection and provide critical information. I hasten to add that Premier Graham cooperated and there is no evidence that he was in any way responsible for the obstruction.

[12] By continuing the investigation as an inquiry, an inquisitorial process, I followed a procedure that was, in some respects, much like a court process, that is, by summoning witnesses and receiving their testimony under oath. The admissibility of evidence is much broader than in a trial.

[13] This process gave me the authority to order the production of critical documents for my inspection, documents that would otherwise be denied production on the grounds of secrecy, privilege or convention. All these grounds were indeed raised and contributed to the increased cost of the inquiry.

[14] The Premier was represented by senior counsel throughout.

[15] The proceedings took place at the Federal Court in Fredericton and were closed. They were closed because the report of the Commissioner remains confidential until it is laid before the Assembly or filed with the Clerk of the Legislative Assembly if the Assembly is not sitting. Upon conclusion of the investigation/inquiry the Commissioner has an obligation to the member before completing the inquiry report. Where it appears that the report may adversely affect the member, the Commissioner must inform the member of the particulars of the report and give the member the opportunity to make representations before the Commissioner completes the report to the Legislative Assembly.

<p>Request for investigation 36(1)Any person may request in writing that the Commissioner investigate an alleged breach of this Act by a member.</p> <p>36(2)A request under subsection (1) shall be in the form of an affidavit and shall set out the grounds for the belief and the nature of the alleged breach.</p> <p>Investigation and inquiry 37(1)On receiving a request under section 36, the Commissioner may conduct an investigation with or without conducting an inquiry.</p> <p>37(2)The Commissioner shall provide the member who is the subject of the investigation with reasonable notice and shall give the member an opportunity to respond to the allegation.</p> <p>37(2.1)When the Commissioner conducts an investigation or an inquiry under this section, the member who is the subject of the request under section 36 shall respond promptly and completely to all of the Commissioner's questions and requests for information.</p> <p>37(3)Where the Commissioner elects to conduct an inquiry under this section, the Commissioner has all the powers, privileges and immunities conferred on a commissioner under the <i>Inquiries Act</i>.</p> <p>Report of Commissioner 40(2)Where it appears to the Commissioner that a report may adversely affect a member, the Commissioner shall inform the member of the particulars and give the member the opportunity to make representations before the Commissioner completes the report.</p> <p>40(3)The report of the Commissioner shall set out <i>(a)</i>the facts found by the Commissioner,</p>	<p>Demande d'investigation 36(1)Toute personne peut demander par écrit au Commissaire de mener une investigation sur une contravention alléguée à la présente loi par un député ou un membre du Conseil exécutif.</p> <p>36(2)Une demande prévue au paragraphe (1) doit être établie sous la forme d'un affidavit et doit indiquer les motifs de la personne et la nature de la contravention alléguée.</p> <p>Investigation et enquête 37(1)Lorsqu'il reçoit une demande en vertu de l'article 36, le Commissaire peut faire une investigation tout en menant ou non une enquête.</p> <p>37(2)Le Commissaire doit fournir au député ou au membre du Conseil exécutif qui fait l'objet de l'investigation un avis raisonnable et doit lui donner la possibilité de répondre à l'allégation.</p> <p>37(2.1)Lorsque le Commissaire mène une investigation ou une enquête en vertu du présent article, le député ou le membre du Conseil exécutif qui fait l'objet de la demande en vertu de l'article 36 doit répondre promptement et de manière exhaustive à toutes les questions et demandes de renseignements du Commissaire.</p> <p>37(3)Lorsque le Commissaire choisit de mener une enquête en vertu du présent article, le Commissaire a tous les pouvoirs, privilèges et immunités dont dispose un commissaire en vertu de la <i>Loi sur les enquêtes</i>.</p> <p>Rapport du Commissaire 40(2)Lorsqu'il apparaît au Commissaire que son rapport pourrait nuire à un député ou à un membre du Conseil exécutif, il doit, avant de terminer son rapport, l'informer de la situation et lui permettre de faire des représentations.</p> <p>40(3)Le rapport du Commissaire doit indiquer <i>a)</i>les faits qu'il a découverts,</p>
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<p>(b)the findings as to whether or not a member has breached the Act and the nature of the breach, and (c)the recommended sanction, if any.</p> <p>40(4)The Commissioner’s report shall remain confidential until it is laid before the Assembly or filed with the Clerk of the Legislative Assembly under section 42 and no person shall disclose all or any portion of it before that time. 2003, c.8, s.6; 2007, c.30, s.24.</p>	<p>b)ses conclusions sur la question de savoir si le député ou le membre du Conseil exécutif a contrevenu ou non à la présente loi et la nature de la contravention, et c)la sanction recommandée, le cas échéant.</p> <p>40(4)Le rapport du Commissaire doit demeurer confidentiel jusqu’à ce qu’il soit soumis à l’Assemblée ou déposé auprès du Greffier de l’Assemblée législative en vertu de l’article 42 et nul ne peut divulguer tout ou partie de ce rapport avant qu’il n’ait été ainsi soumis ou déposé. 2003, c.8, art.6; 2007, c.30, art.24.</p>
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[16] The foregoing explains, in brief, the general procedure followed.

[17] Since the request for an investigation was filed certain events have occurred which need to be mentioned in order to keep the matter in perspective. On September 27, 2010 the Shawn Graham government fell and was replaced by the David Alward government. Although the government changed, Shawn Graham retained his seat as Member of the Legislature for the Riding of Kent. Jurisdiction over Mr. Graham continues.

PARTIES INVOLVED

[18] In the New Brunswick election of September 18, 2006, Shawn M. Graham formed the new government with a comfortable majority. The defeated former premier, Bernard Lord, resigned his seat and eventually David N. Alward became leader of Her Majesty’s Loyal Opposition.

[19] During Premier Graham’s tenure in office many applications for financial assistance came before the government department known as Business New Brunswick. The ultimate decision on whether financial assistance is granted is made by the Executive Council often referred to as the Cabinet.

[20] An extremely large request for assistance by way of guarantees came before Business New Brunswick and the Executive Council from the Atcon Group of companies. The key corporation in the Atcon Group was a construction company from the Miramichi region. Normally, Business New Brunswick did “not assist with construction contract financing or performance bonding.” (Exhibit 118 Privileged) Here, it did.

[21] The Premier’s father, Alan R. Graham, was a director of one of the Atcon related companies, Vänerply AB, and had been a director for many years. He may also have been a shareholder of OPI AB a company that owned Vänerply AB. Alan Graham was also a paid consultant on retainer with Atcon. All of the Atcon Group of companies were controlled by one man, Robert William Tozer.

[22] In the spring of 2010 Claude Williams, then a member of the opposition, requested an investigation into the matter of the financial assistance being given to the Acton Group. He alleged that in participating in the Executive Council guarantees the Premier, as President of the Executive Council, was in conflict by furthering the financial and business interests of his father.

THE AFFIDAVIT AND THE RESPONSE IN JUXTAPOSITION

[23] The request for an investigation into the conduct of Premier Graham and his written unsworn response are reproduced in juxtaposition here except for the exhibits. The remarks in brackets to exhibits A to G are mine. The Williams’ affidavit and Graham response are in the Exhibit Book, Part 2 in their original forms:

<p>NEW BRUNSWICK CONFLICT OF INTEREST COMMISSIONER</p> <p>IN THE MATTER OF A REQUEST FOR AN INVESTIGATION UNDER THE <i>MEMBERS’ CONFLICT OF INTEREST ACT</i>, CHAPTER M-7.01, [STATUTES] OF NEW BRUNSWICK, 1999.</p> <p>LEGISLATIVE ASSEMBLY OF NEW BRUNSWICK</p> <p>REQUEST FOR AN INVESTIGATION INTO THE CONDUCT OF SHAWN GRAHAM, [PREMIER] OF THE PROVINCE OF NEW BRUNSWICK</p> <p style="text-align: center;"><u>AFFIDAVIT</u></p> <p>I, Claude Williams, of the Village of Saint-Antoine, County of Kent and Province of New Brunswick, Member of the Legislative Assembly of New Brunswick for Kent-South, MAKE OATH AND SAY AS FOLLOWS:</p> <ol style="list-style-type: none"> 1. I am Claude Williams, a Member of the Legislative Assembly for the Province of New Brunswick, and, as such, I have personal knowledge of the matters deposed to herein except where otherwise stated. Where otherwise stated, I believe the information to be true. 2. Shawn Graham is a Member of the Legislative Assembly of New Brunswick and has been the Premier of the Province of New Brunswick since October 2006. 3. [Alan] Graham is the father of the said Shawn Graham. 4. The said [Alan] Graham currently sits on the Board of Directors of a mining and petroleum company named PetroWorth Resources. 	<p>Attention: Hon. Patrick A.A. Ryan, Q.C.</p> <p>Dear Sir:</p> <p>Re: Premier Shawn Graham – Complaint by Claude Williams sworn April 7, 2010</p> <p>In regard to the aforementioned affidavit, my response is as follows:</p>
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<p>5. Prior to [Alan] Graham being appointed to the Board of Directors for PetroWorth Resources, [Alan] Graham was a member of the Board of Directors of Vanerply, a subsidiary of the ATCON group of companies.</p> <p>6. I have reviewed the information posted on the websites of ATCON and Vanerply and verily believe that Vanerply became a subsidiary of the ATCON group in January 2001.</p> <p>7. Attached hereto and marked as Exhibit “A” is a copy of the information posted on the ATCON website, including a link to its subsidiary, Vanerply.</p> <p>(Exhibit “A” describes the location and set up of the plant in Sweden)</p> <p>8. Attached hereto and marked as Exhibit “B” is a copy of the information posted on the Vanerply website, including a reference to being part of the Atcon Group.</p> <p>(Exhibit “B” describes the company’s product and the connection to the Atcon Group)</p> <p>9. Having reviewed the information posted on the ATCON website, I verily believe that Robert Tozer is the President and Chief Executive Officer of the ATCON group of companies and its subsidiaries.</p> <p>10. Attached hereto and marked as Exhibit “C” is a copy of the information posted on the ATCON website which forms part of my belief expressed in the preceding paragraph.</p> <p>(Exhibit “C” is a message from Robbie Tozer, head of the Atcon Group)</p> <p>11. I verily believe that Mr. Tozer is also the Chairman of the Board of Vanerply.</p> <p>12. Attached hereto and marked Exhibit “D” is a copy of a corporate profile of Vanerply in which it is indicated that Robert Tozer is the Chairman of the Board of Vanerply.</p> <p>(Exhibit “D” is Vanerply’s corporate profile)</p> <p>13. Attached hereto and marked as Exhibit “E” is a copy of the information posted on the Reuters News Agency website regarding Alan Graham. The information contained on the website indicates, and I verily believe, that the said Alan Graham serves on the Board of Vanerply.</p> <p>(Exhibit “E” is a brief biography of Alan</p>	<p>1. Alan Graham was a Director of Vanerply AB for approximately nine or ten years resigning in May 2009. He was never a shareholder. I had no knowledge of my father’s responsibilities or his remuneration.</p> <p>2. Alan Graham has <u>not</u> otherwise been a Director or Shareholder of Atcon Group during any period since I have been Premier of the Province of New Brunswick.</p>
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<p>Graham and his connection to Vanerply)</p> <p>14. I verily believe that the headquarters of Vanerply are located in [Otterbäcken], Sweden.</p> <p>15. I verily believe that the headquarters of the ATCON group of companies is located in Miramichi, New Brunswick, Canada.</p> <p>16. I have reviewed the various Orders-in-Council and verily believe that since August 5, 2008, approximately \$63,362,845.00 of New Brunswick tax dollars have been provided in financial assistance to ATCON and its subsidiary group of companies.</p> <p>17. I verily believe that said individuals, Robert Tozer and [Alan] Graham, were on the Board of Directors of Vanerply and/or ATCON when ATCON received financial assistance from the New Brunswick Provincial Government.</p> <p>18. On August 5, 2008 while [Alan] Graham was on the Board of Directors of Vanerply, the New Brunswick government issued a press release stating that \$13,362,845.00 was provided to ATCON by way of a loan guarantee. [A] copy of the said press release is attached hereto as Schedule "F" and forms part of my belief.</p> <p>(Exhibit "F" is a Business New Brunswick news release in praise and support of Atcon)</p> <p>19. On March 26, 2009, by way of an Order in Council, the government of the Province of New Brunswick authorized a further \$50,000,000.00 in loan guarantees to ATCON. A copy of the said Order-in-Council is attached hereto and marked as Exhibit "G."</p> <p>(Exhibit "G" is a copy of the \$50 million Order in Council)</p> <p>20. I verily believe that Shawn Graham in pith and substance violated the <i>[Members'] Conflict of Interest Act</i>. I believe that section 4 of the <i>Act</i> is very clear and should have prohibited the Premier from authorizing financial assistance to ATCON. He should have reasonably known that in making the decision there was an opportunity to further his [father's] financial and business interests.</p> <p>21. I verily believe that [Alan] Graham was a member of the Board of Directors of a company receiving financial support from the New Brunswick Provincial Government when his son, Shawn Graham, was Premier. I believe the obvious nature of this violation warrants an</p>	<p>3. Both the 13 Million ("M") and 50M loan guarantees went through the normal channels at Business New Brunswick, i.e., senior management, Industrial Development Board, Board of Management and Cabinet.</p> <p>4. The 13M loan guarantee was related to a bridge contract in the North West Territories, in particular, the 13M was used to assist in construction of a steel fabrication mill in the Miramichi, which in turn helped to secure the bridge contract.</p> <p>5. The bridge contract was cancelled through no fault of Atcon Group or the Province. It is anticipated, that the 13M will be recovered as a result of the cancellation of the contract.</p> <p>6. The 50M loan guarantee was advanced to allow Atcon Group</p> <ul style="list-style-type: none"> a) To finish the steel fabrication mill (10M); b) To pay off high interest rate loans (20M); and c) To secure an operating line of credit (20M). <p>7. The 50M loan guarantee was conditional on several factors, one of which was that Vanerply be sold. Further, it could not reject any offer greater than 18M and it had to be sold no later than July 20, 2010. <u>All</u> proceeds of the sale were to be applied to the loan guarantee of 50M.</p> <p>8. The 50M loan guarantee was approved by the Province in March 2009; Alan Graham resigned from the Board of Directors of Vanerply in May 2009; Atcon Group met their numerous conditions/obligations in June 2009; The money (from the loan guarantee) began being paid in July 2009.</p> <p>9. Atcon group employed 1,785 to 2,100 people, the vast majority of whom either lived on the Miramichi, or were from the Miramichi, and its failure would have major economic consequences for that region and the Province.</p> <p>10. At no time did I consider that I had reasonable grounds to believe that I had a conflict of interest in dealing with the aforementioned loan</p>
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<p>investigation into Shawn Graham's conduct.</p> <p>22. I make this Affidavit in support for an investigation under section 36 of the [Members'] <i>Conflict of Interest Act</i> and for no other or improper purposes.</p> <p>23. My request for an investigation is not frivolous or vexatious and is made in good faith. I verily believe the Premier knew or reasonably should have known that his decisions to use New Brunswick tax dollars directly advanced the financial and business interests of his father [Alan] Graham.</p> <p>SWORN TO BEFORE ME at the City of Fredericton in the Province of New Brunswick, this 7th day of April, 2010.</p> <p><u>Yassin Choukri, Q.C.</u> A Commissioner being a Solicitor</p> <p><u>Claude Williams</u> Claude Williams</p>	<p>guarantees to Atcon Group.</p> <p>If you have any further questions or inquiries, please feel free to contact me or my solicitor Allison Whitehead, Q.C.</p> <p>Yours truly,</p> <p>Shawn Graham Premier</p>
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THE OBSTRUCTION

Investigation becomes inquiry

[24] Following the request in writing that an investigation be conducted into the allegation that Premier Graham was in breach of the *Members' Conflict of Interest Act*, I informed the parties in writing that I would conduct the matter as a simple investigation and that it was not necessary, at that time, to conduct the matter as an inquiry. Then, I had superb cooperation from the various provincial government personnel who were in possession of documents or had personal involvement in the Atcon requests for financial assistance, including the Deputy Minister of Business New Brunswick, Bill Levesque.

[25] Mr. Levesque had come to his position as Deputy Minister in the fall of 2009. This was after the money had been approved and Atcon was descending into deeper financial trouble. Prior to his appointment on October 5, 2009, he served as a member of the New Brunswick Industrial Development Board (NBIDB) at its monthly meetings and was familiar with Atcon's requests for financial aid, particularly the \$50 million in guarantees (\$10 million-fabrication plant, \$20 million to retire a high interest loan and \$20 million for working capital). In fact the New Brunswick Industrial Development Board rejected the Atcon application on March 16 and sent a negative recommendation to the Cabinet shortly before the Cabinet approved the guarantees on March 26, 2009.

[26] I was concerned with the “due diligence” supposedly performed by Business New Brunswick and referred to reverently and frequently in Hansard by various members assuring that the government had done its due diligence before approving the guarantees. As part of the investigation Mr. Levesque provided me with a detailed procedure that applications for financial aid are supposed to follow; this was due diligence. Unfortunately, the stated procedure and what was followed do not coincide. Letter of August 9, 2010 – Bill Levesque to Commissioner Ryan Re: Financial Assistance Process Due Diligence Exhibit Book, Part 2, Exhibit A of the investigation.

[27] The evidence shows that the diligent employees of Business New Brunswick were hampered in every way in trying to get current information from Atcon. It was particularly frustrating. Business New Brunswick instead of getting audited statements from Atcon, were told that they could travel to Miramichi and look at the books. They did. The situation was so ridiculous that there was not even a proper application for the guarantees by Atcon. A financial application was cobbled together by a Business New Brunswick financial officer, John Watt, since retired. He was so familiar with Atcon over the years that he could do this so that there existed at least the semblance of a record for action. Mr. Watt’s consistent, if not persistent, recommendation was contra the guarantees.

[28] When I requested that Deputy Minister Levesque provide me with the details of how Business New Brunswick followed the detailed procedure that he had supplied to me, the information supply from him faltered, then all but dried up. When I asked to inspect certain documents I received correspondence from counsel in the Office of the Attorney General that the documents would not be given to me for my inspection. I took exception to this refusal and saw that the only way I would be able to view the documents and circumvent this obstruction would be through the power of an inquiry. Consequently, I turned the process into an investigation and inquiry. Deputy Minister Levesque was joined by Deputy Minister Byron James, Clerk of the Executive Council, in refusing to produce the documents for my inspection, documents of every nature and kind that went to the Executive Council. I needed to inspect the documents in order to determine what participation the Premier had in the decision making process as it related to Alan Graham. My demands to inspect the documents were vigorously defended by way of argument and the filing of briefs.

[29] My written interim decision is found in the Exhibit Book, Part 2 ordering Deputy Minister Levesque and Deputy Minister James to produce for my inspection the various documents over which they claimed privilege on the grounds of Cabinet confidentiality, convention and the *Interpretation Act*.

[30] In my decision I relied upon decisions of the Supreme Court of Canada, particularly that of Mr. Justice La Forest in *Carey v. The Queen in Right of Ontario*, [1986] 2 S.C.R. 637.

Ordering the disclosure of Cabinet documents for the Court's inspection, he went on to conclude at para. 85:

Divulgence is all the more important in our day when more open government is sought by the public. It serves to reinforce the faith of the citizen in his governmental institutions. This has important implications for the administration of justice, which is of prime concern to the courts.

See also Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst, Sopinka, Lederman & Bryant: *The Law of Evidence in Canada*, 3rd ed., (Markham: LexisNexis, 2009), at p. 910:

In addition to concerning itself with the protection of confidential communications within certain important societal relationships, privilege may be invoked to preserve society as a whole when disclosure may jeopardize the national security of the country or impair the expeditious administration of the government [...] These categories of privilege are based upon diverse sets of external values worthy of protection even in the face of hindering the effectiveness of the trial process. Accordingly, there always exists a tension when the doctrine of privilege is invoked as it consequentially obstructs the truth-finding process. That being the natural result, the courts have not shown great eagerness to proliferate the areas of privilege. Chief Justice Warren Burger put it this way in a celebrated American case [of *Nixon, supra*]:

Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.

[31] The arguments advanced by counsel for the Attorney General relating to privilege failed for the reasons of open government put forward by Justice La Forest.

[32] Counsel for the Attorney General, acting on behalf of the two deputy ministers, also argued that “convention” prevented the deputies from producing the documents. According to the argument, a change in government means that the new government does not have access to the Cabinet records of the previous government. I ruled that I am not an agent of the new government; I am an independent sworn officer of the Legislative Assembly, chosen by consent of the parties for the appointment. Everything that comes through my office is confidential. The inquiry is closed and the results of the inquiry remain confidential until my report is laid before the Legislative Assembly. Subsequent to that, all documents are destroyed except those originals that are returned to the Clerk

of the Executive Council. I will have more to say about the status of the legal process shortly.

[33] If convention trumps law the powers given by the Legislature under the *Members' Conflict of Interest Act* and the *Inquiries Act* to investigate conflict of interest breaches by members of the Executive Council and for the Assembly itself to impose sanctions would be frustrated. Convention does not trump law.

[34] The final argument posed by the agents of the Attorney General acting on behalf of the deputy ministers was that s. 32 of the *Interpretation Act* declares that the rights of the Crown are not affected by any Act or regulation unless it is expressly stated in the Act or regulation that the Crown is bound by it.

[35] My ruling on this argument was that the earlier cases that appeared to close the door found the door being reopened by the Supreme Court of Canada in *Alberta Government Telephones v. Canada (Canadian Radio-Television & Telecommunications Commission)*, [1989] 2 S.C.R. 225, per Dickson C.J.C. at p. 276; 280-281; *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, per La Forest J. at p. 50.

[36] The result is that the purpose of the *Members' Conflict of Interest Act* and the *Inquiries Act* would be wholly frustrated unless, by necessary implication, the Crown is bound. Not making relevant Cabinet documents available for inspection by the Commissioner when a minister is implicated in the decision making at the Cabinet level would not simply be an inconvenience or an undesirable result but would render an inquiry futile, wholly frustrating the purpose of the *Acts*. S. 32 cannot be used to frustrate the legitimate interests of pursuing a conflict of interest at the highest level of office, that of a member of the Executive Council of government.

[37] A few paragraphs ago I said I would have more to say about the status of the legal process. It undoubtedly occurred to counsel for the various witnesses that in their objection to producing certain documents they should pursue the law with respect to judicial review of my demands to inspect documents. Here, they ran into a wall with my appointment as an officer of the Assembly.

[38] The obstacle to judicial review, simply put, is that any conclusions by me are recommendations to the Legislative Assembly which itself makes the final decision on the breach and any recommended sanctions. The Assembly is master in its own house. I am not the decider, I am the provider.

[39] The Supreme Court of Canada has weighed in on the issue of whether an officer of the Legislative Assembly holding an investigation and inquiry into a conflict of interest breach is subject to judicial review by a superior court justice (in New Brunswick this would be a Justice of the Court of Queen's Bench).

[40] In *New Brunswick Broadcasting Co. v. Nova Scotia* [1993] 1 S.C.R. 319 the issue was whether the *Canadian Charter of Rights and Freedoms* applied to a provincial Legislative Assembly. There, the Nova Scotia Assembly refused access to the media's cameras to the public gallery. McLachlin J. (as she then was), concurred in by L'Heureux-Dubé, Gonthier and Iacobucci JJ. supported the province's right to exclude television cameras. At paragraph 115 Justice McLachlin held:

I conclude that the written text of Canada's Constitution supports, rather than detracts from, the conclusion that our legislative bodies possess those historically recognized inherent constitutional powers as are necessary to their proper functioning.

[41] In support of my view that the Office of the Conflict of Interest Commissioner is not subject to judicial review when I, as Commissioner, am inquiring into an allegation of a breach of the *Members' Conflict of Interest Act*, I refer to:

Tafler v. Hughes, 161 DLR (4th) 511; 11 Admin LR (3d) 228; 49 BCLR (3d) 328
Lambert J.A., writing for the British Columbia Court of Appeal, held:

15. I have considered the decisions of the Supreme Court of Canada in **N.B. Broadcasting Co. v. Nova Scotia** [1993] 1 S.C.R. 319 and **Harvey v. A.G. New Brunswick** [1996] 2 S.C.R. 876. Both of these cases relate to provincial Legislative Assemblies. Neither of those cases decides conclusively the question of whether a decision of the Assembly or of an officer of the Assembly, with respect to the conduct or mis-conduct of a member of the Assembly acting in relation to his or her office, is amenable to judicial review. But in both cases Madam Justice McLachlin wrote careful reasons on that question and concluded that any decision with respect to discipline in relation to such conduct comes within the sphere of decision-making under the exclusive control of the Legislative Assembly itself and, as such, is not amenable to judicial review.

16. The **Harvey** case was decided after the judgment of Mr. Justice Melvin in this case and, of course, he did not have the benefit of that decision in preparing his reasons. But he relied on the **N.B. Broadcasting** case and, after quoting a number of passages from that decision, he said this:

Here, as I mentioned, the Commissioner is acting for and on behalf of the Legislative Assembly in providing that body with information and opinion. The nature of the investigation relates to the functioning of the member of the Legislative Assembly. Control over members or a member, or sanction of a member, remains with the Legislative Assembly. In my opinion, information gathering which may assist the Assembly in dealing with its own members is a vital step in the decision of the legislature and is necessary to the proper functioning of the Assembly as Madam McLachlin J. referred to in...the **New Brunswick Broadcasting** decision. Consequently, the manner in which it chooses to deal with its members in the context is one cloaked with privilege, the exercise of which is not reviewable.

17. I agree with that conclusion. In my opinion, the privileges of the Legislative Assembly extend to the Commissioner who is expressly made an officer of the Assembly by sub-section 10(1) of the *Members' Conflict of Interest Act*. In my opinion, decisions made by the Commissioner in the carrying out of the Commissioner's powers under the **Act** are decisions made within, and with respect to, the privileges of the Legislative Assembly and are not reviewable in the courts.

[42] A similar result came about in the case of *Morin v. Northwest Territories (Conflict of Interest Commissioner)* (1999), 29 C.P.C. (4th) 362 (N.W.T.S.C.) by Vertes J.; also at 1999 CanLII 6802.

[43] In the Supreme Court of Canada decision in *Canada (House of Commons) v. Vaid* [2005] 1 S.C.R. 667 at paragraph 29 the Court approved the privilege found in *Tafler v. British Columbia (Commissioner of Conflict of Interest)*.

AGENTS OF THE ATTORNEY GENERAL

[44] Counsel for the various government witnesses who were called to testify at the inquiry requested, sought or were offered representation by lawyers from the Office of the Attorney General. No matter whomsoever was contacted in government by counsel for the inquiry the employee was directed to tell counsel for the inquiry to contact a certain lawyer in the Office of the Attorney General.

[45] During the hearings it became apparent that the Office of the Attorney General had given counsel to various levels of government with respect to the Atcon requests for financial aid. This had been going on over a period of years. When I say "at various

levels” I mean that the advice of counsel was made at intake levels and at higher levels as the matters proceeded up to and including the level of the Executive Council. Whether the lawyers and the advice given at each level were the same even though different bodies with fresh ideas were different, the process smacks of a systemic conflict of interest. The process needs to be reviewed.

DESTRUCTION OF DOCUMENTS

[46] In order to look at all pertinent documents various witnesses were summoned to testify in the inquiry and were directed to produce their e-mails. E-mails produced on government computers belong to the government. Employees who use the government computers as though they are their personal computers run the risk of losing their privacy. Some exceptions may apply: *R. v. Cole*, 2012 SCC 53, Date: 20121019, Docket: 34268. In the case of one high ranking New Brunswick employee this happened. The employee was given a summons and promptly deleted the e-mails. Counsel for the inquiry was able to recover the e-mails. As it turned out there was nothing of value to the matter before the inquiry on the recovered documents. I chose, perhaps mistakenly, not to pursue contempt proceedings.

[47] Purging your e-mails when legally ordered to produce them is unacceptable; it is called spoliation, the destruction of evidence, and may constitute an obstruction of justice. If the evidence is not recoverable it may well lead to a presumption against the person, the spoliator.

MISLEADING THE INQUIRY

[48] A further episode occurred when a deputy minister misled the inquiry with no obvious purpose except perhaps known only to the man himself. The deputy minister was being questioned by counsel with respect to the financial exposure of the province on a \$13 million guarantee for Atcon relating to the Deh Cho Bridge project in the Northwest Territories in 2008. Following the change in government in the 2010 New Brunswick election the province had to replace a letter of credit with payment of the \$13 million. After Atcon’s construction deficiencies are corrected New Brunswick may receive some monies back.

[49] Events unfolded as follows: The existence of Order in Council, 2010-527 dated October 19, 2010, paying \$13,362,845 to the Northwest Territories replacing a loan guarantee to Atcon’s bank of April 3, 2008, for \$13,362,845 was not revealed to counsel for the inquiry by an agent of the Attorney General until January 7, 2011:

October 19, 2010

2010-527

Under subsection 5(1) of the Economic Development Act, the Lieutenant-Governor in Council gives his approval for the Minister of Business New Brunswick to enter into an agreement with the Government of the Northwest Territories and/or Deh Cho Bridge Corporation as appropriate, subject to the following:

- (a) payment by the Minister under the agreement shall not exceed \$13,362,845;
- (b) the agreement replaces the current Business New Brunswick guarantee amount of \$13,362,845 outstanding on the Letter of Credit for the Deh Cho Bridge project; and
- (c) the agreement shall terminate no later than six months after the rectification of Atcon Construction Inc. deficiencies.

Graydon Nicholas
Lieutenant-Governor

19 October 2010

[50] Although the authority to pay in place of the guarantee is dated October 19, 2010 and was known to the deputy minister, he testified one month later on November 22, 2010, as follows:

Q. In referring to the bundle of documents marked "Guarantee 2008" I've not been able to review the documents at the end of '09 and early 2010 in great detail, but my question is, Is the guarantee still out there, the \$13 million?

A. No, it has terminated.

Q. It's terminated?

A. It's terminated November 1st.

Q. All right.

A. It's November 1st.

Q. So the, the guarantee is gone? The Province will not have to pay on the \$13 million?

A. That's, that's correct.

Q. Did they pay out or did they...
A. The guarantee has... The guarantee is terminated on, on, on November 1st and the bank has not called [the loan].
Q. So that's the end of it?
A. The bank has not called [the loan]. The guarantee has been finished and...
Q. Did they give you the guarantee back? Has it been returned?
MR. LOGAN: Not, not to date, no.
A. No.
Q. Well, I don't see the need for any questions if that guarantee is, is not longer extant [extant].
THE COMMISSIONER: So, how much did that involve?
MR. FALOON: Nothing.
THE COMMISSIONER: Zero?
MR. FALOON: Yeah.
THE COMMISSIONER: That's the kind of guarantee you need.
MR. FALOON: It, it was... it was... it was to support a letter of credit.
THE COMMISSIONER: Oh, I see.
MR. FALOON: The letter of credit's been revoked and the guarantee is gone. So I don't see any reason to question him. We can come back to it, if necessary, but at this time my, my questions were based on whether or not there was a liability.
THE COMMISSIONER: So, we're done are we
MR. FALOON: Yes.
MR. LOGAN: Well, I would like to come back to it when we reconvene, perhaps, and I need to have some offline discussions with counsel...
THE COMMISSIONER: Of course.
MR. LOGAN:... and perhaps with yourself. I'd rather not do it here because it's...
MR. FALOON: With respect to the guarantee?
MR. LOGAN: Yes.
MR. FALOON: Oh, so it's not done.
MR. LOGAN: The guarantee is done.
MR. FALOON: All right.
THE COMMISSIONER: But... Yes. So, we're, we're adjourned then until December the 7th.

Transcript November 22, 2010

[Pages 191-193]

[51] A witness, when testifying swears "to tell the truth, the whole truth and nothing but the truth." To testify otherwise is misleading. When the hearing resumed on December 7, 2010 the deputy minister continued with his misleading testimony:

Q. No, you keep that and give me my copy back. That's correct,

thank you. The... As I understand it from your previous testimony, that guarantee is not... still...is not outstanding at the present time?

A. No, it has, it has, has been terminated November 1st. November 1st it has been...

Q. And there's no liability that can spring up in the future with respect to that guarantee? It's closed?

A. It's closed to this, yes. Um-hmm. Yes. Um-hmm.

MR. FALON: Thank you.

Transcript December 7, 2010

[Pages 231-232]

[52] The truth of the situation was not revealed until February 3, 2011 when the Deputy Minister of Business New Brunswick was again questioned at the inquiry about the \$13,362,845 paid by the province.

MR. FALON: Thank you."

Now, again, on December the 7th you were under oath, and you were under oath to tell the whole truth. Why did you not disclose in this testimony that the guarantee had been paid?

A. Well, again, the information...my reasoning for this is the information was not public information at that point, sir. You've asked me two questions. This one I don't remember. Under oath, from my knowledge and what I know and I understand is I cannot divulge information that is not public here as an OIC, an Order-in-Council. Obviously, when...Not obviously when we... the OIC was developed, we had discussions with our...with [our] lawyer, with our team on explaining the, the documents...

Q. I can barely hear you, Mr. Levesque.

A. Well, well I...At that point on November 1st it was expired. I... Once the agreement and the OIC is not public, for my sake as Deputy Minister, I, I...we don't divulge the information. It's confidentiality of Cabinet at that point, so I kept on that...on that principle.

THE COMMISSIONER: Why didn't you give us an explanation for...that explanation which you're giving now, that you were not able to divulge because there was something...a matter before Cabinet or whatever? Why, why wouldn't you give us that information?

A. Well, sir, I remember my...our team...I remember Mr. Logan standing up at that point stating that we had an issue but I, I did not, sir. I did not because of confidentiality of, of the Order-in-Council, confidentiality of the decision of Cabinet at that point.

Q. But as, as the Commissioner has asked you, could you not have given an explanation and said, "Look that's a very good question. I can't divulge it right now because the matter's before the Cabinet, but we will give you an answer in due course."

MR. LOGAN: I don't have...

THE COMMISSIONER: Sit, sit down, sit down, Mr. Logan.

Q. Could you have said that?

A. I could've said that, yes. I could have said that, Mr. Faloon, yes.

THE COMMISSIONER: Well, that would've been the whole truth.

A. I could have said that, yes.

Transcript February 3, 2011

[Pages 957-960]

[53] After 56 years as a litigator, lecturer, trial justice, appeal court justice and conflict of interest commissioner my experience is that the deputy minister, in so testifying, did not feel any sense of wrong doing, having persuaded himself that he was doing it in a good cause. He was wrong.

HISTORY OF ATCON APPLICATIONS

[54] As mentioned, Mr. Tozer and his Atcon Group were not strangers to what Premier Graham described as the money source of last resort, Business New Brunswick.

[55] Over the years, Atcon companies sought and received financial assistance from the Province of New Brunswick through Business New Brunswick.

- Atcon Plywood Inc. received a \$1,250,000 forgivable loan in 1991 which has since been forgiven as agreed based on employment; a \$2,500,000 loan guarantee in 1999 which has been released; a \$2,500,000 guarantee in 2004 with an **outstanding balance owed to the Province of about \$950,000** and a \$4,000,000 bridge loan issued in 2004 with an **outstanding balance of \$1,540,000.** Exhibit 11
- In 1997, Skyway Wood Products (Eastwood Furniture) received a \$384,000 loan and a \$532,000 forgivable loan from the CFB Chatham Redevelopment Fund. This company has been closed. The \$137,000 balance of the Loan and the unforgiven portion of the forgivable loan are estimated to be \$240,000. **The amount of outstanding assistance is \$377,000.** Exhibit 11
- In 2000, ARVIN received a \$400,000 forgivable loan which was not fully advanced. This is in connection with the renovations to the former Tech Sea building. The company moved its production equipment into the building and is starting to create the 80 required jobs. The long delay in the move and job creation results from the devastating

effects of the closure of COM DEV in Moncton, which was Arvin's biggest customer. **The outstanding assistance is in the amount of \$350,000.** Exhibit 11

- In 2000, Atcon Group received a \$50,000 grant cost sharing of bid preparation.
- In 2001, Envirem Technologies received a \$100,000 loan and a contribution of 100 acres of land at CFB Chatham. **The loan balance of about \$16,000 is outstanding.**

Exhibit 11

- In 2004, Atcon Veneer Products Inc. received a \$290,000 term loan guarantee and a \$300,000 working capital loan guarantee. This assistance was approved but was never put in place due to changes in the company's plans. Exhibit 11
- In 2007 Nutritec received a \$650,000 repayable loan. Nutritec also received a \$100,000 loan, which is a joint venture between Atcon and Couvoir Westco. **The outstanding assistance is in the amount of \$750,000.**

Exhibit 11

- In 2008 Atcon Industrial Services received a \$3,060,000 forgivable loan; a \$3,250,000 repayable loan and a \$1,190,000 contribution from RDC. **The outstanding assistance is \$6,310,000.** Exhibit 11
- In 2008, Atcon Holdings received a \$13,362,845 loan guarantee and has **an outstanding balance of \$13,362,845.**

Exhibit 11

- In 2009, Atcon Holdings received a \$50,000,000 guarantee. **The outstanding balance is \$50,000,000.** Exhibit 11

- Nelson Venture Capital received a \$210,000 venture capital loan made to the employees of Nelson Forest Products. Atcon assumed this liability and it has been repaid.

Exhibit 11

- As of November 22, 2010, the total amount of fees owed to Stewart McKelvey, the Advisory Board and Mr. Ron Nugent total \$100,926.17. Exhibit 131

Atcon's \$50 million "Application", so-called. – No formal application was ever presented.

[56] The following is a brief history of its course:

[57] January 13, 2009, a "Summary of Request" was prepared by Business New Brunswick to consider a request from Atcon Holdings Inc. for financial assistance in the form of a \$50 million loan guarantee. The recommendation was not to support the request. Exhibit 11

[58] January 19, 2009, Project Review Committee met to deal with this request and agreed with John Watt, the financial officer's recommendation to reject the company's request. Exhibit 13. The Industrial Development Board met on the same day to deal with this request and deferred its recommendation. Exhibit 12

[59] February 6, 2009, the financial officer, John Watt, prepared a memorandum dealing with the request in which he outlined the company's dismal track record. On February 9, the Industrial Development Board met again to discuss the request and concurred with the deferred departmental recommendation. Exhibit 15

[60] March 16, 2009, Industrial Development Board met again and concurred with the departmental recommendation to reject the company's request for the \$50 million loan guarantees. Exhibit 24. However, on March 26, 2009, Cabinet including Shawn Graham who chaired the meeting considered the application and approved it.

Exhibits 116 (and 120 Privileged)

[61] March 27, 2009, Business New Brunswick drafted offers to the company dealing with the financial assistance. Exhibits 30, 31 and 32

[62] April 23, 2009, Cabinet including Premier Graham who chaired the meeting met and amended the offer of financial assistance by deleting the words “portion of a revolving operating” as they appear in paragraph 3 of Order in Council 2009-130 replacing it with a \$20 million dollar guarantee of a 4-year term loan.

Exhibits 116 (and 121 Privileged)

[63] On April 29, 2009, final agreements dated April 24, 2009 were signed between Business New Brunswick and the company. Exhibits 35, 36 and 37

[64] June 4, 2009, Cabinet including Premier Graham who chaired the meeting met and amended the offer of financial assistance by allowing Atcon companies to bid on Province of New Brunswick construction contracts excluding P3 projects but that upon notification by the Province of New Brunswick of a competitive bid from another New Brunswick company, the Atcon company would withdraw its bid.

Exhibits 116 (and 122 Privileged)

[65] June 9, 2009, the acting Minister of Business New Brunswick, the Honorable Jack Keir, issued a letter to the company dealing with the restrictions on construction activities in New Brunswick by Atcon companies. Exhibit 46. A second letter was issued on the same date outlining that Atcon companies could bid on Province of New Brunswick-funded contracts excluding P3 projects while the financial assistance by way of loan guarantee(s) is in effect but that upon notification by the Province of New Brunswick that a competitive bid was received from another New Brunswick company Atcon had to withdraw from its bid. Exhibit 47

[66] June 11, 2009, Atcon provided a draft list of payments of its outstanding payables to Business New Brunswick. Exhibit 48

[67] June 12, 2009, Grant Thornton issued a letter dealing with its audits of Atcon Construction Inc., Envirem Technologies Inc. and Atcon Industrial Services Inc.’s internal controls and outlining material weaknesses and recommendations. Exhibit 49

[68] June 16, 2009, the acting Minister of Business New Brunswick issued a memorandum dealing with a comprehensive review of the company's operations.

Exhibit 50

[69] June 23, 2009, a conference call was held with Northwest Territories government representatives dealing with the Deh Cho Bridge. At this point it became apparent that the Northwest Territories were highly dissatisfied with Atcon's performance as a general contractor, and it was implied that the Deh Cho Bridge Corporation Ltd. shared that opinion of Atcon's performance. Letter from Gamble to Tozer with enclosures Exhibit Book, Part 2.

Exhibit 52

[70] June 30, 2009, the Minister of Business New Brunswick issued a letter to the Bank of Nova Scotia outlining that the letter of offer preconditions had been met. Exhibit 56

[71] During the month of June 2009, Atcon prepared a document entitled Certificate of Pending Litigation which showed millions of dollars in litigation against Atcon companies. Should Business New Brunswick's "due diligence" not have exposed this financial cancer before any monies had even been paid?

Exhibit 58

Atcon Construction Inc.

- Kildair Service Ltd. - \$338,147.67 – supply of materials – Notice of Registration of Memorial of Judgment filed May 22, 2009 (being paid from Trust during closing of refinancing)
- Atco Structures Inc. - \$17,334.30 – supply of service – Notice of Civil Claim filed May 29, 2009 (Canadian Natural Resources Ltd. "CNRL")
- PTI Premium Camps Services Inc. - \$650,716.50 - supply of service – Statement of Claim filed June 3, 2009 (Canadian Natural Resources Ltd.)
- Noralta Lodge Ltd. - \$281,454.30 – supply of service –Statement of Claim filed April 30, 2009 (Canadian Natural Resources Ltd.)
- Genivar Consultants Limited Partnership - \$335,464.40 – Statement of Lien filed May 6, 2009

- United Rentals - \$124,155.30 – supply of service – Statement of Lien filed May 20, 2009 (Canadian Natural Resources Ltd.)
- United Rentals - \$222,944.46 – supply of service – Statement of Lien filed May 20, 2009 (Canadian Natural Resources Ltd.)
- United Rentals - \$47,973.32 – supply of service – Statement of Lien filed May 20, 2009 (Canadian Natural Resources Ltd.)
- United Rentals - \$28,275.43 – supply of service – Statement of Lien filed May 20, 2009 (Canadian Natural Resources Ltd.)
- Stantec Consulting Ltd - \$131,547.82 – supply of service – Statement of Lien filed April 30, 2009 (Canadian Natural Resources Ltd.)
- Can-Traffic Services Ltd - \$2,811,739 – supply of material/service – Statement of Lien - expired
- Neutrino Trucking Ltd. - \$2,638,669 – supply of trucking services – Statement of Lien - expired
- Bruce Rendell – wrongful dismissal – Statement of Claim filed April 17, 2009
- Kevin Pytck – wrongful dismissal – Statement of Claim filed December 23, 2008
- Jose Rodriguez - wrongful dismissal – Statement of Claim filed May 8, 2007

Envirem Technologies Inc.

- Frederick Dunster & Sons Ltd. - \$36,442.50 – transport of compost – Notice of Action with Statement of Claim filed June 6, 2009 (this claim is included in listing of New Brunswick suppliers to be paid by end of June 2009)
- Canadian National Railways - \$165,169.25 USD - disputed amounts – Notice of Action with Statement of Claim attached, Notice of Intent to Defend, Statement of Defense filed January 19, 2009 on the basis that no amount is payable and the amounts claimed were claimed against an insolvent debtor in Maine, Morse Brothers. The action has been stayed because of the arbitration.

Atcon Industrial Services Inc.

- Russel Metals Inc. - \$114,123.33 – supply of metals – Notice of Action with Statement of Claim filed March 26, 2009 (this claim is

included in listing of New Brunswick suppliers to be paid by end of June 2009)

- Russel Metals Inc. - \$771,753.76 – supply of metals to Eastern Canadian Structures then to Scotia Sheet Metal (materials eventually supplied to expansion at fabrication facility) – Notice of Action with Statement of Claim filed March 10, 2009
- Rideout Tool and Machine Inc. - \$16,536.58 – supply of goods and services – Notice of Action with Statement of Claim filed May 6, 2009
- Eastern Fence Limited - \$47,220.85 – supply of materials re expansion of Fabrication facility – Notice of Action with Statement of Claim dated February 11, 2009 (this claim is included in listing of NB suppliers to be paid by end of June 2009)

Atcon Plywood Inc.

- Groupe Savoie Inc. - \$45,815.19 – supply of wood – Notice of Action with Statement of Claim filed January 28, 2009 (this claim is included on list to be paid with NB suppliers by end of June 2009)

[72] June 30, 2009, the \$20 million working capital guarantee, the \$20 million subordinated debt guarantee and the \$10 million capital expenditure guarantee between the Province of New Brunswick, Bank of Nova Scotia and Atcon were signed.

Exhibits 59, 60 and 61

[73] July 17, 2009, the acting Deputy Minister of Business New Brunswick, Phil LePage, issued a letter to the Bank of Nova Scotia outlining that Atcon Holdings had permission to draw an additional \$2 million under the capital expenditure guarantee.

Exhibit 63

[74] On the same date a second letter was issued to the Bank of Nova Scotia authorizing it to advance up to \$8 million of the capital expenditure loan guarantee. Exhibit 64. This was done following a request from Katrina Donovan of Atcon on July 16, 2009, to John Watt for assistance in dealing with the company's line of credit which would only support \$28 million and the need for working capital.

Exhibit 64A

[75] August 4, 2009, Ernst & Young Inc. issued a report to the Bank of Nova Scotia which indicated that the company had a serious working capital shortage and errors totaling \$2.8 million which would have a cumulative effect of reducing the June Borrowing Base by 10% from \$26.2 million to \$23.5 million.

Exhibit 71

[76] August 10, 2009, at the request of Atcon, Business New Brunswick prepared a summary request for \$2 million previously approved for capital projects to be disbursed instead for working capital and that the province release its first security interest in Brun-Way Highways Operations Inc. in favour of the Bank of Nova Scotia to enable bank financing of up to \$3 million for working capital. The recommendation was that Business New Brunswick not agree with the request. Exhibit 74

[77] On the same date New Brunswick Industrial Development Board met to deal with this request and the members of the board concurred with the department recommendation to reject the request. Exhibit 76

[78] August 12, 2009, Ciaran R. Dooley from the Bank of Nova Scotia communicated with Sadie Perron from Business New Brunswick regarding Atcon's lack of working capital and the \$9 million payable to Canada Revenue Agency. Exhibit 76A

[79] August 13, 2009 Cabinet including Premier Graham who chaired the meeting met and amended the offer of financial assistance authorizing a \$2 million advance previously approved for capital projects to working capital. Exhibits 116 (and 123 Privileged)

[80] August 18, 2009, Atcon correspondence to H. Smith of Canada Revenue Agency collections with a restructuring proposal. Exhibit 79K. During this month, a draft restructuring plan was prepared by Ernst & Young Inc. Exhibit 78

[81] August 21, 2009, advice to the Minister of Business New Brunswick was prepared providing a briefing on the Atcon Group of companies. It outlined that Atcon was indebted to the bank in an amount of about \$28.5 million with a margin security shortfall of about \$23 million and the request allowing the Bank of Nova Scotia a first security position as per Ernst & Young Inc. restructuring plan. Exhibit 79

[82] September 2, 2009, Cabinet including Premier Graham who chaired the meeting met to consider a restructuring plan prepared by Ernst & Young Inc. whereby the province was asked to release its security in favour of the Bank of Nova Scotia. This request was rejected but reconsidered on September 11, 2011, at which time it was approved.

According to the documents available to the Inquiry from the Executive Council it is not known whether Premier Graham was present at the September 11, 2009 meeting.

Exhibits 116 (and 124 and 125 Privileged)

[83] September 10, 2009, Minister Victor Boudreau of Business New Brunswick wrote to Purdy Crawford thanking him for agreeing to be part of the Advisory Board to the Atcon Group of companies. Exhibit 82

[84] September 15, 2009, the Minister of Business New Brunswick confirmed by letter to the Bank of Nova Scotia and Atcon that the Bank of Nova Scotia would have 100% first security over the Brun-Way highway maintenance contract and Atcon's plywood mill in Sweden in respect to any amounts outstanding on the credit line in excess of \$28.5 million and that, between \$10 million and \$28.5 million, Bank of Nova Scotia and Province of New Brunswick would each be entitled to 50% of the net proceeds of realization on the security and that at such time that the credit line is reduced to \$10 million, priority over the security would revert to the province. Exhibit 87

[85] September 22, 2009, a forbearance agreement between Atcon Holdings Inc., Bank of Nova Scotia and the Province was signed. Exhibit 96. On the same date, the Minister of Business New Brunswick issued a letter to the Bank of Nova Scotia agreeing to the advance of another \$3 million to Atcon Holdings. Exhibit 90

[86] October 31, 2009, an Interim Supplemental Priorities Agreement between Atcon, the Bank of Nova Scotia and the province was drafted. Exhibit 108

[87] November 5, 2009, Cabinet met to deal with the indemnification of the Directors of the Advisory Board of the Atcon Group of companies. Premier Graham was not present during this meeting. Exhibits 116 (and 126 Privileged)

[88] On the same date, Terms of Engagement Governing the Appointment of Ross Landers as Chief Restructuring Officer of Atcon was issued. Exhibit 105

PREMIER GRAHAM'S SUPPORT FOR ATCON

[89] When Premier Graham and his government took over the reins of power on September 18, 2006, they were confronted with many challenges and our country was on the cusp of a worldwide recession. As the economy of the province soured the government of the day changed its prime recovery strategy from job creation to job retention. In the Premier's testimony at the inquiry he referred repeatedly to the job retention strategy of the government during the hectic days of his term of office.

[90] At no time did I find that the Premier was disingenuous or lacking in frankness in his testimony.

[91] He couched his own support for the Atcon guarantees in a revealing lifting of the inner veil of how the Executive Council works. The Premier presides over the meetings. There is no vote taken when support for the item on the agenda is to be approved or rejected. Approval or disapproval is done by "consensus." A consensus is a collective view of a majority opinion, that is, a general agreement of opinion on a subject. No vote is registered as to who was in favour and who was not. No individual tally of the ministers' views is recorded. The ministers speak freely. No minutes are taken. No notes are preserved.

[92] The nucleus of support for the financial assistance in question for the Atcon Group came from the Miramichi area ministers and from the Premier.

[93] Various Executive Councils had dealt with Atcon requests for assistance on numerous occasions. The Atcon companies were far from strangers to a series of Executive Councils over the years. Their record of multiple trips to the Executive Council was well documented. Closer attention to the record, even passing attention to the record, would have raised a red flag. Any red flag, it seems, simply disappeared among the field of flags being ignored in pursuit of the mantra "job retention" good or bad, right or wrong, and at any cost. Premier Graham admitted that he knew and his government knew Atcon's history and that financial assistance to Atcon was "high-risk."

[94] The highs and lows of New Brunswick's record with the Atcon companies, from the companies 'entrepreneurial pinnacles' to the abyss of bankruptcy are documented elsewhere in this report to the Legislative Assembly. Consequently, I will not repeat the litany here but will begin in 2008 when Atcon sought financial aid for its fabrication plant. It needed millions in order to be able to bid on the construction of a bridge in the Northwest Territories called the Deh Cho Bridge. The steel plant in the Miramichi was essential to fabricate steel units in the construction of the bridge. Having received a

guarantee of funding for the plant, Atcon now needed a further guarantee to secure the bridge contract. The Deh Cho Bridge Corporation Ltd. wanted a performance bond of \$65,000,000 but would accept a letter of credit from a bank for \$13,362,845 being 10% of the contract price. Without the performance bond or the letter of credit Atcon would not be able to proceed with the contract. Typically, the province was unaware of this preliminary condition until the last minute. Without this guarantee for the letter of credit the bridge contract was dead. The Executive Council capitulated and the crack in the Atcon foundation began to spread.

[95] In early 2009 Atcon again came knocking on the door, this time for \$50,000,000. The Atcon companies needed (1) \$10,000,000 to finish the steel plant, a plant that was supposed to be built for \$11,000,000 but already cost \$9,200,000; (2) \$20,000,000 to pay out a high interest charging company, McKenna Gale (MG Stratum Fund III) at 18% to 20%; and (3) \$20,000,000 operating capital on a revolving line of credit. There was a delay because the Bank of Nova Scotia refused to accept the guarantee on a “revolving” line of credit and insisted upon a fixed sum of \$20,000,000 which meant that the province was exposed to the entire \$20,000,000 instead of the amount drawn down from the loan.

[96] In order to lessen the eyes-wide-open “high risk” certain conditions were put on the guarantees with failing results:

- a) Personal guarantee from Robert Tozer except for his principal residence; this was changed so there was no personal liability (approved by Board of Management April 2, 2008 and by Cabinet April 3, 2008) on the \$13 million guarantee.
- b) Corporate guarantees; the companies went bankrupt;
- c) Creation of an advisory board; The board gave up;
- d) Security on Vänerply, Atcon’s Swedish company in which the Premier’s father was a director, and security in the Brun-Way Highway maintenance contract; the province recovers nothing;
- e) Arrange for a review of the company’s assets;
- f) Advisory board to review any contracts in excess of \$5,000,000;
- g) Sell or monetize the Brun-Way contract by September 30, 2009; no recovery;
- h) Sell or monetize Vänerply by July 31, 2010; no recovery;
- i) Not to bid on provincial construction contracts if another New Brunswick company is bidding, including sub-contracts;

- j) Provide the minister with a plan resolving the (millions of dollars) in outstanding payables; buried in debt.

[97] With this background I move now to consider the alleged breach under the *Members' Conflict of Interest Act*:

Conflict of interest

4 A member shall not make a decision or participate in making a decision in the execution of his or her office if the member knows or reasonably should know that in the making of the decision there is the opportunity to further the member's private interest or to further another person's private interest.

[98] The question to be answered is: By presiding over the Executive Council did the Premier participate in making decisions with respect to guarantees for financial assistance to the Atcon Group of companies?

[99] If so, did the Premier know or should he reasonably have known that in participating in the making of the decisions with respect to financial assistance to the Atcon Group of companies that there was the opportunity to further the private interest of another person, to wit his father, a director and paid consultant?

[100] The evidence is clear that the Premier, in presiding over the Executive Council while the Atcon guarantees for financial assistance of \$50,000,000 were being decided upon, was in fact participating in making decisions in the execution of his office. In his written reply to the allegation of conflict of interest, the Premier does not respond to the implication that he presided over the meetings of the Executive Council in which the guarantees for Atcon were granted, varied or otherwise decided upon.

[101] The Premier testified that if he was present, he presided. In Exhibit 116, the attendance records show that he was present when financial assistance was decided upon in relation to Atcon on April 3, 2008; May 1, 2008; March 26, 2009; April 23, 2009; June 4, 2009; August 13, 2009; September 2, 2009; September 11, 2009 (unknown); November 5, 2009 (absent).

[102] The Premier was unequivocal in his testimony that he supported the financial assistance to Atcon.

[103] The Premier testified that the policy shift from job creation to job retention forced upon the province by the recession drove his overriding strategy to help employment in

the Miramichi. I have no doubt of the accuracy of his testimony in this regard except that fiscal management of the province also seemed to be at play.

[104] At the same time, the government was involved in negotiations with the Province of Quebec on the proposed sale of NB Power's generation assets to Hydro-Québec. The intended sale was announced on October 29th, 2009 by Premier Graham and Quebec Premier Jean Charest.

[105] Premier Graham testified about the negotiations as follows:

...what I can say today is you can see how preoccupied my time was on so many other different files...

Q. Oh, I understand.

A....versus just dealing with this file on a day-to-day basis. I can't exactly recall the exact date when Cabinet was informed of the decision. It is all public knowledge to what I've said here today. It's been public knowledge before. It was at the peak of the recession when the Prime Minister called all parties to Ottawa...all Premiers to Ottawa to put forward a strategy to help Canadians continue to work and maintain their level of employment. It was at that meeting in Ottawa where I approached Premier Charest and said there's an opportunity for us to, to look at...to look at a potential sale of the asset of NB Power to Hydro Quebec. And I'm just remembering now if it was the meeting at the Delta or sorry at the...there was two meeting [s] at Ottawa so Premier Charest and I met in Ottawa for the first time. Premier Charest had just finished securing a large majority government in Quebec. Prior to that, he was preoccupied of, of governing a minority government situation. And we looked at an opportunity where we could share the risk of generation between our two assets and help deal with the skyrocketing challenges of electricity and new investments that NB Power was going to have to make going forward and the refurbishment of the Mactaquac [dam] and also the [Coleson] Cove generating station. So preliminary discussions were held and I think it was three or four months later when there was an actual indication from the Office of the Premier in Quebec that they were seriously considering what was...what I had initially raised with the (sic) him that discussions commenced. It was only when we could look at determining some form of a framework that that information was brought to Cabinet with the framework that was in place. And I forget the exact date but, we did not want to, to begin the process of informing Cabinet until the Minister responsible had a framework in

place and that's when the Minister brought forward a potential framework.

Transcript May 26, 2011

[Pages 1724-1726]:

[106] With the province's financial assistance the Atcon Group of companies continued to function as events overtook them.

[107] The evidence establishes that the Premier did participate in decisions at the Executive Council level in the execution of his office as claimed but does not establish that his own private interests were furthered.

[108] The question remains as to whether the evidence establishes that the Premier reasonably should have known that the decisions in which he participated at the Executive Council level in granting financial assistance to the Atcon Group of companies gave rise to an opportunity to further the private business and financial interests of his father, Alan Graham?

[109] The evidence establishes that Alan Graham, a long time successful and acclaimed New Brunswick politician had been a director of Vänerply AB, a company listed as one of the Atcon Group the principal companies of which eventually went into receivership. Robert Tozer was the virtual owner through another Swedish company called OPI Plywood AB. Alan Graham had been a director of Vänerply since early 2001 and had been the driving force in making the Swedish company successful. For the first few years, until the end of March 2006, Mr. Graham was paid his quarterly director's fees, \$3,750 by Vänerply.

[110] If Vänerply had continued to pay Alan Graham in 2006, the company would have had to withhold 25% more or less under Swedish laws because Mr. Graham was a non-resident. In order to circumvent this, Mr. Graham billed Atcon for his director's fees and then, as owner, Atcon recouped the sum by including it in management fees from Vänerply.

[111] Was Alan Graham still a director of Vänerply when the Premier as head of the Executive Council presided over meetings in March and April 2009 that approved financial aid to the Atcon Group of companies? By his own admission Alan Graham was a director of Vänerply from 2001 and at least until May 15, 2009. On that latter date he testified that he delivered a letter of resignation to Robert Tozer at the Atcon offices at Miramichi. This was confirmed by Mr. Tozer in his testimony. A copy of the letter was admitted as Exhibit 42.

[112] The matter of the resignation is surrounded by peculiar circumstances. According to Mr. Graham he never notified anyone at Vänerply that he had given his resignation to Mr. Tozer. Mr. Tozer testified that he never advised anyone at Vänerply that Mr. Graham had resigned. It was only much later on February 25 and again on March 11, 2010, after the issue was raised politically that Mr. Graham informed Leo Persson, managing director of Vänerply in Sweden about his resignation. Mr. Persson advised that one remains a director until a formal document is filed in the proper government office in Sweden. In any event, Alan Graham was still invoicing Atcon for thousands of dollars in director's and other fees up to and including December 31, 2009, seven and one-half months after the letter of resignation dated May 15, 2009. In an e-mail to Vänerply on January 12, 2010 Exhibit Book, Part 2, Cindy Cassidy, secretary to Mr. Tozer, writes "As per Robbie Tozer, please pay the attached two invoices for Alan Graham." Later on in 2010 Mr. Graham withdrew his two December 31, 2009, invoices.

Exhibit 157, Exhibit 158

[113] In addition to his Vänerply director's fees, Mr. Graham would also bill the Atcon companies a retainer of \$200 per week as well as for any additional work he did for any of the Atcon related companies, over and above the retainer. Exhibit 151

[114] It is clear that without the financial assistance of the Province of New Brunswick through Executive Council support, the Atcon Group of companies would have collapsed as it eventually did, the signs of serious trouble having appeared during the 2008 applications for assistance when Alan Graham was on the board of directors of Vänerply and on retainer with Atcon. With the province's financial backing in 2009 the Atcon projects could proceed, tenuous though their life longevities might be; employment continued.

[115] On March 26, 2009, the Cabinet approved a \$10,000,000 guarantee to complete a building at Miramichi, a \$20,000,000 guarantee for working capital and a \$20,000,000 guarantee to pay off a high interest rate debt to McKenna Gale. According to Premier Graham the Atcon companies actually got access to the money in July, 2009.

[116] In the meantime the opposition was raising questions in the Legislature about the guarantees totaling \$50,000,000. Eventually the opposition raised the issue of the Premier's father being a paid director and consultant.

[117] Alan Graham testified that he was being asked by various workers and creditors of Atcon to help them get paid because they knew he was connected with Atcon. The number of complaints from unpaid creditors took their toll. Believing that his reputation

was at stake, Alan Graham resigned by letter dated May 15, 2009 delivered personally to Mr. Tozer at Miramichi, Exhibit 42. Mr. Tozer confirmed this but did not respond with a letter of acceptance nor a reply. The copy of the letter of resignation entered as Exhibit 42 in this inquiry came to the inquiry through the Premier's Office.

[118] Given Premier Graham's commitment to job retention, I find that the guarantees for the \$50,000,000 in financial aid were approved by consensus of the Executive Council and that Premier Graham chaired the meetings. As the Premier explained, the Miramichi region was depressed, needed stimulation, businesses were closing, jobs were at a premium, Atcon was a major employer and he viewed Business New Brunswick and the Executive Council as the financial refuge of last resort. He knew and the government knew that Atcon was a high risk client.

[119] Perhaps the guarantees were going to happen with or without the guiding hand of the Premier. It would appear, however, that Alan Graham's position as a director of Vänerply played only an incidental role in the outcome as to whether the guarantees were going to be approved. Alan Graham's Vänerply role vis-à-vis the Premier was subsumed in the big picture, the loss of jobs to the Miramichi even though many Atcon jobs were in Alberta. This, however, does not address Alan Graham's role as a consultant and on retainer to Atcon.

INDEPENDENT BOARD: PURDY CRAWFORD

EXTERNAL ADVISORY BOARD

[120] During the spring, summer and early fall of 2009 the fortunes of the Atcon Group showed increased signs of disturbing proportions. Relations with clients on the western jobs were rapidly deteriorating, the Bank of Nova Scotia was increasing the pressure, and creditors were not being paid. Without a dramatic intervention collapse appeared to be imminent. Two desperate efforts were made to save the Atcon Group. First, the accounting firm of Ernst & Young Inc. was called in to go over Atcon's books and to report to the Bank of Nova Scotia.

[121] On August 4, 2009 Ernst & Young Inc., examined Atcon's books and reported to the Bank that in their opinion the number of potentially non-compliant items from Atcon's books as of June 6th, 2009 amounted to \$18.6 million which, they said, may or may not have been properly treated by management in calculating the 2009 June borrowing base. Management disagreed with Ernst & Young Inc. and said no adjustment was necessary.

[122] The Executive Summary of Ernst & Young's report of August 4, 2009, Exhibit 71 is as follows:

As at 6 June 2009, Atcon had a \$40.0 million operating credit, a borrowing base of \$26.2 million, a total operating credit use of \$39.4 million and a borrowing base deficiency of \$13.2 million. A copy of the June Borrowing Base is attached as Appendix 1. Errors, and potentially non-compliant items which may affect the accuracy of this borrowing base, are shown at Exhibit A. We have discussed these matters with Mr. Robert Tozer, President, Mr. Mark Ledwell, Vice President and Legal Counsel and Ms. Katrina Donovan, Vice President Finance and CFO (collectively hereinafter referred to as “Management”). A brief summary follows:

- Errors – In the course of our review we have identified errors such as duplicate accounts receivable accruals, duplicate inventory postings, under-reported HST, employee source deductions, and wage accruals, etc. (see Exhibit A). We have reviewed these errors with Management who concur with EYI’s assessment. The correction of these errors has the cumulative effect of reducing the June Borrowing Base from \$26.2 million to \$23.5 million, a reduction of approximately \$2.8 million or 10%.
- Potentially Non-Compliant Items – EYI has identified certain items listed in Exhibit A which potentially should not have been included in the June Borrowing Base because their inclusion may not be compliant with the strict terms of Atcon’s credit agreement with the Bank. Management believes these items are compliant and consistent with their historical borrowing base reporting practices. A brief description of larger items follows:
 1. \$10.7 million of accounts receivables – at issue with these accounts receivable is the interpretation of the definition of the 90-day eligibility period for borrowing base inclusion. The inclusion of these items had the effect of increasing the June Borrowing Base by \$8.0 million.
 2. \$3.2 million of accounts receivable accruals – at issue with these items is the determination of when project WIP is properly converted into a *bona fide* account receivable and therefore eligible for inclusion in the borrowing base calculation. The inclusion of these items had the effect of increasing the June Borrowing Base by \$2.4 million.

3. \$8.2 million of action, suits or proceedings – at issue with these items is that they may have priority over the Bank’s security, they were not reported in the June Borrowing Base and they may or may not have a direct correlation to Eligible Receivables included in the June Borrowing Base (e.g., the item may relate to a > 90-day or a disqualified account).

Although we have not concluded it is appropriate to deduct these items from the June Borrowing Base, we have included them at Exhibit A for the Bank’s consideration.

[123] John Watt of Business New Brunswick testified with respect to Exhibit 71 beginning at page 713 of the transcript:

Q. I’d like to refer you to Exhibit 71. Now if I might just lead you a little bit, Mr. Watt, Exhibit 71 was the study done by Ernst & Young, commissioned by the Bank of Nova Scotia to look at the...as I understand it, the borrowing base calculation for Atcon as at a specific date...I believe it was June...June 6th. In other words, they wanted At...they wanted E&Y to go in and determine whether or not there was sufficient items there to justify the operating line of the \$40 million. And they prepared this report dated August the 4th, and there’s an executive summary at page 2. Can you just sort of in your own words tell us what they found?

A. They found what, in their opinion, were a number of errors in the reporting by the company where they were in fact including receivables that should not have been in the receivable list and should have been in the work in progress list. They had a question on the dating of some of the receivables as to whether or not they should have been included in the receivable list. And they’re claiming that the company was under-reporting statutory debts such as HST, employee source deductions, all of which would come off the borrowing base. So effectively, what they were saying is the company was misleading them on what was available for the bank to lend against. Without getting into specific numbers...

Q. Okay.

A....they’re basically claiming that the company was misleading the bank.

THE COMMISSIONER: Was this intentional or is it just negligence, sloppy bookkeeping?

MR. WATT: I...I don’t know the answer to the question. It certainly should not have happened. I mean Katrina Donovan was a chartered accountant. She came out of one of the big

accounting firms. She should have...this should not have happened. Ultimately, it was her responsibility, so she...she was signing the statutory declarations to the bank every month saying that the information was correct.

THE COMMISSIONER: In your view, were these serious omissions on...

MR. WATT: Oh, very...very serious.

THE COMMISSIONER: Yeah. Okay.

MR. WATT: These are...these are multi-million dollar errors.

THE COMMISSIONER: Yes. Thank you.

Q. Could you refer to the last page in the narrative prior to the appendix? I can't see whether...I guess it's page 11. Yes. It's hard to read, but...the first paragraph of the summary, "Our review to date clearly shows the company has a serious working capital shortage and requires a significant equity injection or other arrangement to provide the company with sufficient working capital to satisfy its existing liabilities, etc." Would you agree with that statement?

A. Oh, absolutely.

Q. Yes. And I think you've already said that. The next paragraph, "We have identified in this report errors totalling \$2.8 million which have the cumulative effect of reducing June borrowing base by 10 per cent. We have also identified a number of potentially non-compliant items totalling 18.6 million, which may or may not have been properly treated by management in calculating the June borrowing base." What's the effect of...of that? What was the effect of that? As the account executive, that 18.6 million non-compliant items, what...how would you react and treat that?

A. At this point in time, management...company management did not agree with Ernst & Young that these were non-compliant. The company argued that no adjustment was necessary. So you have basically a difference of opinion with a CA that works for the company and an outside consulting firm that's working for the bank. The bank's accountants are going to take the most cautious approach they can and the company's going to take the most liberal approach they can. That's...you see that every day. What the recommendations were, that the bank should go back in and look at every one of these and determine whether or not an adjustment was necessary in the accounting records. I'd have to look at the exhibits to see what the non-compliant items were.

Q. I'm not sure that it matters an awful lot because of subsequent events.

A. No, it doesn't. The fact is the company, in large part because of operating losses and the sudden shutdown of all the western business, ran out of cash.

Q. Um-hmm.

A. And as I mentioned before, any company with big overheads that you suddenly cut off the cash flow, the effects are devastating.

Transcript December 21, 2010

[Pages 713-717]

[124] With this dire background, the second desperate effort was made in September 2009 to bring in more professional help in the form of an external advisory board headed by Purdy Crawford a highly successful lawyer with a convincing record of being able to help troubled companies. The board consisted of other proven businessmen. The preliminary meeting to form an advisory board was held September 24 in Toronto.

[125] In the meantime, the Bank of Nova Scotia was demanding and getting the province to provide the bank with first priority over two profitable assets, Brun-Way and Vänerply AB. Brun-Way held a road maintenance contract for part of the Trans-Canada Highway and Vänerply AB of Sweden was an Atcon related plywood company owned by the Swedish company OPI Plywood AB controlled exclusively by Robert Tozer.

[126] The advisory board met regularly commencing in October 2009, but the continuing disputes over the Deh Cho Bridge job, the increasing creditors' claims, pressure by the bank, a lack of working capital, a failure to obtain replacement contracts and the downward global economy made the advisory board's job impossible. The financial wreckage was overwhelming, Purdy Crawford's efforts were futile, the Bank of Nova Scotia moved against Atcon and the advisory board never did present a final report. The board cost the province \$100,000.

[127] In his testimony Mr. Watt had this to say about the advisory committee beginning at page 839 of the transcript:

Q. Could you briefly outline the mandate of that committee?

A. It was a committee of essentially high powered businesspeople put together to try and bring some structure and direction to Atcon. It came out of the concern that Atcon was basically a one-man company and needed that kind of help.

Q. And you also discussed Ross Landers, and apparently he didn't stay very long?

A. No, he didn't.

Q. Why is that?

A. He couldn't get along with Robbie.

Q. So you were part of that advisory committee? Am I...

A. I was an observer.

Q. So the chair of the committee would have been?

A. Purdy Crawford.

Q. Okay. What were the findings of the committee at the end of it all?

A. The committee, over the time it was in place, did its best and tried to consider everything. At the end of it all, they came to the conclusion that the company was too far gone, couldn't be saved.

Q. When did they come to that conclusion, approximately, ball park?

A. I...I honestly don't know.

Q. Did you agree with those findings?

A. Yes.

Q. So as an observer, who played the key role in that...in that committee?

A. I'm not sure...I'm not sure there's an answer to it. I mean the board sat and discussed; Purdy Crawford was the chairman...they discussed all aspects of...all major aspects of the company. It was a roundtable. Different committee members spent various amounts of time at Atcon trying to get a handle on the company. Some of them were working directly with clients of Atcon's in the west, trying to settle receivables and that type of thing. But for the most part, it was general discussions on what the company should be doing, and it always dealt with problems. There were simply so many problems, you couldn't focus on changing the direction of the company, that type of thing.

Q. Were there any key findings or any key factors they considered in coming to their conclusion?

A. Money. Business out west was faded, it was failing, it was still failing very badly, and the company was not getting new contracts. Had these huge unpaid creditor bills and had seniority pushing...just reached the point where there was no way out.

Q. During your earlier testimony you mentioned that BNB did not support or recommend providing financial assistance.

A. Correct.

Q. What were the factors that BNB relied on or why did they come to that conclusion? Why did BNB not want to recommend providing financial assistance?

A. It had to do with the debt load of the company, the profitability of the company, the fact that it was a one-man operation and was far too big for its available cash flow. There were...there were a number of...basically all financial and management factors.

Q. Debt load, one-man operation, too big.

A. Too big for its capital base.

Transcript January 12, 2011

[Pages 839-842]

ALAN GRAHAM'S PERSPECTIVE

[128] Mr. Graham is a former Deputy Premier of the Province. Following eight elections and a lengthy and successful political career he went on to directorships in various private, national and provincial businesses while continuing with a number of local

businesses of his own in the Rexton, Kent County area. His son, Shawn, succeeded him when the seat became vacant. Currently Mr. Graham is a Commissioner with the Canadian Nuclear Safety Commission a federal government commission. In fact, during this inquiry Mr. Graham was acting as chairperson of a federal commission but made himself available between sessions of his commission.

[129] Mr. Graham testified that since his retirement from government and because of his expertise he has taken five bankrupt companies and restored them to success without government assistance. This expertise made him a valuable asset to Vänerply AB, the Atcon affiliated company in which he held a directorship.

[130] Vänerply AB is a company incorporated in Sweden owned by OPI AB, another Swedish company. OPI is owned outright by Robert Tozer who controls all the Atcon related companies.

[131] According to the evidence, Vänerply was bankrupt and was purchased by Mr. Tozer through OPI, Mr. Graham was called in by Mr. Tozer in 2000 or early 2001 to micro manage Vänerply back to success, which he did. Mr. Graham spent almost ten years as a director of Vänerply for \$15,000 per year plus a monthly retainer and \$250 per day for other work. Mr. Graham testified that the monthly retainer started out at \$2,000 but was reduced to \$800 and was charged to Vänerply and other Atcon companies. Control of which Atcon companies contributed to the retainer, other than Vänerply and Atcon Plywood (formerly Nelson), was left to Mr. Tozer. Mr. Graham testified that he helped Mr. Tozer on wood procurement for Nelson Plywood and helped him with Envirem, another Atcon company.

[132] Mr. Graham and Mr. Tozer had known each other for over 20 years. They were longtime friends with many mutual interests, having met when Mr. Graham was Minister of Natural Resources.

[133] Mr. Graham estimates that he got \$200,000 from his association with Mr. Tozer:

I got, oh, a couple hundred thousand dollars probably over
a period of ten years.

Transcript September 26, 2011

[Page 1989]

[134] The evidence establishes that Mr. Graham was a director of Vänerply AB and a consultant to the Atcon Group of companies during the critical years 2008 and 2009

when the Executive Council was under the chairmanship of his son, Shawn Graham. During Mr. Graham's tenure with the Atcon Group of companies there were two mysterious occurrences: 1. Was he a shareholder of OPI AB the Swedish company controlling Vänerply? 2. Did he resign as a director of Vänerply on May 15, 2009 as evidenced by his letter of that date? Exhibit 42

OPI MYSTERY

[135] The Receiver in Bankruptcy of the Atcon Group has no record of Alan Graham ever being a shareholder of OPI AB and Mr. Graham testified that he was surprised to find out that he was a shareholder.

[136] On May 17, 2011, when he was asked by counsel to the inquiry whether he was an officer, director or shareholder of OPI AB, he testified as follows:

Q. OPI AB?

A. I'm going to hesitate here. I never knew that I was on that board. Never signed the board minute or anything else. For the record, my under...my understanding, I was only on and always signed off on the minutes and so on of Vanerply Limited.

Q. Right.

A. It came to my attention after the receivership with the... receivership and the receivers that there was one share that had been in my name.

Q. In OPI?

A. In OPI, and I signed off on that a long time afterwards, but I never even knew...I had never been involved in a...in one board meeting, one...signed anything for OPI and I...and I didn't even know how that had happened, but it was required that I...that I sign off and there was one share in OPI that...and I signed it... signed it off and I have no idea whether it went to the receivers or what, but it was given to me signed.

Q. Okay.

A. So as I say, I say no, I'm not on that board, but to be perfectly clear, I don't...that share didn't necessarily put me on the board.

Q. Yeah.

A. But I did have a share of...a certificate with one share.

Transcript May 17, 2011

[Pages 1363-1364]

[137] On September 26, 2011 Mr. Graham was again questioned about the share in OPI AB that he said he signed for the Receiver, Ernst & Young:

Q. Now, who did you talk to at Ernst & Young?

A. Nobody. I, I talked to no one. The only... When it came to my attention -- and I, I thought I explained it in the initial... in the initial hearing there on, on May whenever was, 17th, or whatever it was -- that it only came to my attention when Robbie Tozer brought it and said he had a form, had something for me to sign and he would come to... he would come, come over and I said I would go part way and meet him and I met him in St. Margarets, and when I signed it I noticed it was a share in OPL. That was the first time I knew about it.

Q. Okay. Did you ever talk to anyone at Ernst & Young?

A. No, I didn't. The only person and the only contact I've had with regard to that piece of paper, which surprised me at the time, was, was Robbie Tozer when he brought it that day and I don't have a date on it, but it was, I know, after the receivership.

Q. The receivership is still going on.

A. Well, after they were put into receivership I meant to say.

Q. Did you ever talk to a fellow by the name of George Kinsman?

A. Not to my knowledge. I... The name doesn't ring a bell. Not to my knowledge.

Q. Did you ever talk to anyone by the name of Matt Harris? These are people at Ernst & Young.

A. Yeah, no, not to my... To be... To be honest with you, I have talked to people at Ernst & Young on other companies that, that had nothing to do with Atcon, but I... and I don't, don't recall anybody at Ernst & Young. I've never discussed anything with Ernst & Young to my knowledge with regard to anything to do with Atcon.

Q. Did you have any conversations with anyone Ernst & Young with respect to Vanerply?

A. Not to my knowledge, no.

Q. Okay. Now, let's move onto St. Margarets. We were informed by Mr. Whitehead, and you've confirmed what he said, was that you met Mr. Tozer at St. Margarets. Where is St. Margarets?

A. It's about halfway between Richibucto and Miramichi.

Q. And do you recall when that was?

A. Look, I, I tried to find... go through my records 'cause I try to keep track of everything, of everything I do with a diary and I couldn't find it, but I know it was in the summer.

Q. Summer of what year?

A. Well, I believe it would've been, what, we're in 2011, I believe it was last summer, 2010.

Q. Did you sign anything...

A. I'm not sure, but I believe that's when it would've been.

Q. Tell, tell me what you... what you remember signing.

A. It was a share certificate of which...asked me to sign the back of it, which I did. And it was a, a share certificate to my knowledge. When I looked at it it was a share for one share in OPI, and I had no idea that I'd ever even been part of that.

Q. Did you keep a copy?

A. No, we were both...we were in a car in front of the Roman Catholic church, I think it was, in St. Margarets.

Q. Do you recall discussing any other matters with Mr. Tozer?

A. No, not at all. I just said...I, I didn't realize that, that, that I had this and then I just said I'll sign it for you because I, I didn't realize I had anything to do with it.

Q. Let's back up a little bit. What happened prior to you going there? Did Mr. Tozer call you?

A. Yes, he...or, he...either he or his secretary, I'm not sure. I can't remember which, but someone called me and said that there was a...there was a form needed to be signed and would I, would I sign it. And I said, well, I have no problem with signing off anything, so.

Q. And, and did they describe what it was?

A. No, they didn't.

Q. Okay. So you went to St. Margarets really not knowing what you were going to sign?

A. Not knowing what I was signing. I thought it was probably something to do with Vanerply.

Q. Okay. Now, Mr. Tozer sent an email to you...

A. Yes.

Q...which I thank you for sending me a copy.

A. I apologize for taking so much time to do that but I, I couldn't get a hold of him, so. Okay, go ahead.

Q. I'm just trying to find it. Now, Mr. Tozer said on September the 20th you did not have anything to do with OPI in any way. You were only involved with Vanerply on the board. So why would he ask you to sign a share if you had nothing to...

A. No idea. And I don't know whether the...it...I, I, I have no idea. I read that the very same way and that's why I sent it to you because I, I had no idea that I had anything to do with OPI, unless I've made a mistake and it wasn't an OPI share but I am 99.9 percent that I'm...my, my memory and my, my viewing was correct.

Transcript September 26, 2011

[Pages 1935-1940]

[138] Why is the OPI share mystery of interest? John Watt, the Business New Brunswick financial expert, testified that he knew Alan Graham was a director of Vänerply. He found this out when he was reviewing the financial records of Atcon while the various guarantees were being considered by the Executive Council but this knowledge did not trigger in him a warning of a conflict of interest. I find this inexplicable. However, he

testified, if Alan Graham had been a shareholder, that would have signaled a red flag, a conflict of interest. Either one should have been a red flag that the Premier was facing a potential conflict of interest if the Premier's father had the opportunity of benefiting from Cabinet decisions chaired by the Premier. Surely an obligation to perform due diligence includes examining for conflicts of interest.

RESIGNATION MYSTERY: When a resignation is not a resignation!

[139] When Mr. Graham arrived back from his annual winter trip to Florida in 2009 he began putting his affairs in order. Atcon was very slow paying him and owed many people. He testified that his reputation was at stake. He testified that he tendered his resignation as a director of Vänerply AB to Robert Tozer at Miramichi on May 15, 2009. He continued to work as a consultant on retainer and do other work for Vänerply and the Atcon Group. He testified as follows about why he resigned as a director. At this time he did not explain why his continued employment as a consultant to Vänerply and Atcon did not also affect his reputation but his directorship would:

Q. Did you ever do any consulting work for her?

A. No, other than the fact...I'd like to just if I could deviate, Your Honour, just for a minute because it might save some time and maybe it won't, and if it won't, I respect that, but I didn't resign from Atcon because of loan guarantees that the government was making, which is a perception that a lot of people may think of. I resigned from Atcon because of my reputation, and I resigned from Atcon because things were going from bad to worse as far as money he owed everyone in the country. And I would get calls...a truck driver would say "I hauled potting soil to Ontario"...a friend of mine, and he'd say "Do you have any connection with Atcon to get my cheque they've owed me for two years?" "Have you"...I'd get a call from...talked to a farm machinery dealer and he'd say "You know, Robbie Tozer's got to pay his f-ing bills. He owes me \$10,000" and he said "I'm still charging to him because I'm a fellow on the Miramichi" and so on and so forth.

Q. I think we're going to get into this, Mr. Graham, in due course.

A. Yeah, but what I guess I want to say is Atcon owed me money, also, and they weren't paying, and I tendered my resignation because of my reputation.

Q. Okay.

A. Because I didn't...I wanted to be able to say to people "Look, I have nothing more to do with Atcon."

Q. Okay.

A. And it has nothing to do with regard to...with regard to the loan guarantees. So I just want you to understand, I would meet Katrina Donovan...When I went to Miramichi, a lot of the times

I would go with a list of people who had called me and say, "Look, this is a poor man. He's got truck payments to make and he hasn't been paid for hauling your topsoil two years ago." Or "This is a...this fellow hauled gravel for you on a road job and hasn't been paid and he's called me because he's...he's...he knows me and so on." So that was the reason, and that's what my meetings would be a lot of the times with Katrina Donovan and with Gordie Burns. Would say is, "When are you going to get...when are you going to pay these people? They've done their work, they've paid their HST on the bill, they've done all this and they haven't been paid." And that...Katrina is the financial person. That was...a lot of the times I would call her and see if that was done because I knew that Sweden was making money; I had no idea what was going on in...

Transcript May 17, 2010
[Pages 1379-1381]

[140] According to his evidence Mr. Graham's resignation from the board of directors of Vänerply was because his reputation was at stake, Atcon was not paying its creditors and he was being approached by various creditors to intercede and perhaps felt criticized by way of association. The puzzling aspect of this testimony is that Mr. Graham remained on the Atcon payroll as a consultant in the entire year 2009 and continued to advise Vänerply and Atcon personnel well into 2010. There was no public announcement of his resignation as a director of Vänerply. In fact neither Mr. Tozer nor Mr. Graham notified Vänerply personnel in Sweden of the resignation. Vänerply continued to send daily reports to Mr. Graham and he acted upon them. It was not until February 25, 2010, that Mr. Graham notified the head office in Vänerply that he had resigned from the board on May 15, 2009:

For your information I have resigned from the board at Vanerply on May 15th, 2009.

[141] Mr. Graham testified that he found out in this flurry of overseas e-mails with Vänerply in February 2010 that Swedish law requires a resignation from the board of directors to be filed with its registry office for corporations. The failure to notify Vänerply of the resignation brought the immediate notification that there had not been any compliance with Swedish laws. Legally, he was still a director.

[142] It was not until February 25, 2010, that Vänerply was notified of the May 15, 2009, Graham letter purporting to resign as a director and it was not until the spring of 2010 that the issue of a conflict was raised in the Legislature by the opposition of the day. The only thing that changed was that Mr. Graham was no longer receiving his quarterly

payments as a director but was still on retainer. There was no written acknowledgement of the resignation.

[143] With respect to his income other than the quarterly payments for director's fees, Mr. Graham testified that his original retainer was \$2,000 per month. The retainer fee was changed in 2002 and became \$800 per month until December 31, 2008, when it changed to \$100 per week from Nelson (Atcon Plywood) and \$100 per week from Vänerply.

[144] When he was asked why he charged a retainer fee for the balance of May after his resignation dated May 15, 2009, he testified that the retainer fee had nothing to do with the director's fees. He billed Atcon Management for his director's fees and the Atcon Group for his retainers.

[145] Then, something very strange happened which Mr. Graham testified was an error. He sent out two invoices to the end of 2009, more than six months after having resigned as a director. Both are dated the same date, the 31st of December, and are the equivalent of the \$3,750 director's quarterly fees except that they are for work as an advisor. In any event, Mr. Graham explained that they were sent out by his wife in error although he assumes full responsibility for the error.

[146] He testified that on February 24, 2010, he sent an e-mail to Lisa Godin the account manager at Atcon cancelling the two invoices because he did not think that Atcon...

could afford that type of money at this time and that I had thought that I had earned enough money from them and to, to help them through this difficult time.

Transcript September 26, 2011

[Page 1949]

[147] Clearly, Mr. Graham felt entitled to the money for the work done and intended to be paid. In 2010, before the cancellation e-mail to Ms. Godin by Mr. Graham, the two invoices for the last two quarters of 2009 had been approved, as initialed in the lower right-hand corner by Mr. Tozer, for direct payment by Vänerply in Sweden but were rejected by Vänerply because they were addressed to Atcon.

The letter of resignation

[148] The letter of resignation as a director of Vänerply addressed to Atcon to the attention of Robbie Tozer dated May 15th, 2009 is self-explanatory: Exhibit 42

ALAN R. GRAHAM

Atcon Management
624 Newcastle blvd. Miramichi N.B
E1V 2L3

Rexton N.B.
May 15, 2009

Attention Robbie Tozer

Dear Robbie

After much thought I wish to tender my resignation as a Director for Vanerply AB in Otterbecken Sweden. effective today May 15 2009. I do this with much reservation as you and I have seen much success in Sweden from 2002 when you had the vision to take ownership of a bankrupt company half way around the world and turn it into the largest plywood producer in Sweden[.]

The one hundred and fifty employees there have seen an uncertain future turned into a bright and secure employment opportunity producing the highest quality product in all of Europe. Your leadership in turning this company into a real success story makes me proud to have been part of the team that has made it possible. As the financial statements for 2008/09 are not yet completed I will still sign off on them when they are completed by our Swedish auditors.

Again thank you for including me in this company's success and I wish to continue our close friendship with you and your family[.]

Sincerely,

Alan R. Graham

[149] There were various explanations given as to why Mr. Graham resigned from Vänerply. He testified that it was because Atcon was not paying its creditors and he was being approached by unpaid creditors because of his association with Atcon. It was a matter of his reputation. He also was critical of the long delay in getting his own accounts paid and testified that his resignation had nothing to do with the loan guarantees:

I resigned from Atcon because of my reputation, and I resigned from Atcon because things were going from bad to worse as far as money he [Robert Tozer] owed everyone in the country.

Transcript May 17, 2011

[Page 1379]

[150] There was another rather critical admission which came about in an e-mail to Leo Persson in Sweden, deputy member of the board and managing director of Vänerply AB, Exhibit 147:

Ämne: Re: Information
Från : Alan & Connie Graham <grahamexport@gmail.com>
Datum: Wed, 3 Mar 2010 12:36:21 – 0400
Till: Leo Persson <leo.persson@vanerply.se>

Leo

Since I gave notice to Robbie of my resignation on May 15th 2009 can you also inform the Swedish Patent and Registration Office (PRV) That I am officially not a director The main reason for this resignation is there is a conflict of my association with the Atcon Group here in Canada and I do not want it to become public that I am associated with Atcon Please send me your phone number so we can talk directly and be assured I will help you in anyway I have great pride in what Vanerply has accomplished in the years we have worked together As a friend I am available to talk at any time

Alan

[151] Mr. Graham's explanation of this e-mail referring to a conflict of interest was partly as follows:

Q. Is that statement true?

A. Certainly. Certainly it was. After it came out in the Legislature and I was slammed all over the thing and had no way of defending myself, I lived as a private citizen for some 11 years afterwards and got accused of things. And people hide behind the Legislative process and be able to make statements and I had no way of defending myself unless I hired lawyers and so on, I, I was very concerned about that. But as I had said at the outset, that was not the reason why I resigned from Atcon in the first place, which was because they owed they owed so much money. But when it came to this I was very concerned because this was coming out in the Legislature and I was, yeah, almost every day it was...I was in the press and I didn't appreciate that because over my 31 years as a...as a politician and eight...and eight elections I always tried to maintain a — oh, I've got your papers — I always tried to maintain a bit of ethics and I think the history would show that that I did. I also tried to raise my family the same way. I would attack a political party in the Legislature

and tear strips off them, but I always believe you don't attack a person. You don't get personal and I practiced that all of my life and I wanted to do that again.

Transcript May 17, 2011
[Pages 1429-1430]

[152] Mr. Graham was concerned that he was being targeted as having a conflict of interest and he wanted to refute any such implication. Recall that this e-mail to the managing director, Mr. Persson, in Sweden in February 2010 was well after his written resignation dated May 15, 2009, which, in turn, was well after the Order in Council in March 2009 authorizing the \$50 million to Atcon. I attempted to clarify the "conflict" issue with Mr. Graham.

THE COMMISSIONER:...what did you mean by the conflict?

A. Well, I, I was so upset and my wife was so upset and her family were. And even my other kids, my daughter was calling saying, you know, "Look, Dad, you're in the paper again. What's going on?" and so on and so forth that I was just so upset that I wanted to make sure that there was no conflict. And I did put the word "conflict" in there because...but it was what I was reading in the press and what was going on every day that was concerning me. It wasn't the matter of, look, I'm a big boy and if I did something I'll, I'll accept the consequences, but I...when you get mis-truths...I was being accused of a conflict that wasn't there, and I was referring to that conflict that I was being accused of.

Transcript May 17, 2011
[Page 1479]

[153] Mr. Graham was quite specific about his efforts to distance himself from anything political, particularly because of his long-standing association with the federal government nuclear commission on which he was and has been commissioner for a number of years. This was important to him. He wrote letters of resignation to his former political party organizations and stayed away from provincial politics. He was of the opinion that he would be seen as politically advising his son if he did not dissociate himself from all contact with the Premier except for festive occasions. Because of differences of opinion on provincial matters, Mr. Graham also decided that he would avoid talking to his son on matters controversial or otherwise.

[154] For example when a matter arose between Atcon's right to bid on construction work in New Brunswick in competition with the Road Builders Association of New

Brunswick Inc. he advised his son Andrew, then the incoming president of the Association:

He was...In that year that Atcon got the loan he was the incoming president and he called me on a couple of occasions and said, "What do I do, Dad?" And I said, "Look, if you want to talk to your brother about whether he should or shouldn't, that's up to you, but I'm not touching it. I am not advising Shawn on anything political whatsoever."

Transcript May 17, 2011

[Page 1434]

[155] The March 26, 2009 Order in Council disqualifies Atcon from getting road jobs within the province if any other New Brunswick company bids on the job. This prohibition is also referred to in a Business New Brunswick e-mail dated March 6, 2009.

[156] In 2008 Mr. Graham certified to the Government of Canada that he would observe the Ethical Guidelines for Public Office Holders and Guidelines for the Political Activities of Public Office Holders. This certificate, Exhibit 154, was a condition of holding office federally.

[157] Without the New Brunswick government's financial assistance, the Atcon companies could not succeed. Behind the scenes the house of cards was already trembling. Despite other desperate measures by the Executive Council and many other well intentioned efforts, the Atcon empire was, inexorably, on the verge of collapse, leaving an unemployment crater on the landscape of the Miramichi.

[158] Alan Graham testified that he had nothing to do with the guarantees or any advice to Atcon about them. He said he learned about the guarantees from the press. He testified:

A. No, I'm getting into fact and the fact is -- and I want it understood and I'm on the record under oath -- that I never discussed the Atcon loan with Shawn Graham or any other type of government activities with Shawn Graham...

Transcript May 17, 2011

[Pages 1438-1439]

[159] Mr. Graham's instinct was quite accurate when he zeroed in on the issue of a "conflict." Nothing that he did, in context, pointed to a conflict initially caused by him. However, with all his political experience and savvy it is astonishing that, when he learned of the guarantees, he did not see that although he originally was the faultless participant in a conflict of interest he was also the legitimate object of it; decisions had been made at the Executive Council level that gave rise to the opportunity of furthering

his private interest. As a former member of the Executive Council he seems not to have recognized that financial assistance to the companies from whom he obtained engagement as a director and consultant would benefit him and put his son in a potential conflict of interest if not actual conflict once the applications for guarantees were approved. He made no attempt to discuss with his son that his position as a director and paid consultant to the borrower might pose a problem to his son.

THE PROBLEM

[160] What evidence connects the Premier to his father's association with Robert Tozer, Atcon and Vänerply? Should he reasonably have known that in participating in making the decision to provide financial assistance to the Atcon Group of companies that there was the opportunity to further his father's private interest?

[161] The Atcon Group had to have financial assistance from the province in order to further its interests, even its survival. Alan Graham was a director of Vänerply and a paid consultant to Atcon. The continued operation of the Atcon companies meant that Alan Graham's position and income, a private interest, would also continue.

4 A member shall not make a decision or participate in making a decision in the execution of his or her office if the member knows or reasonably should know that in the making of the decision there is the opportunity to further the member's private interest or to further another person's private interest. [Emphasis added]

THE CONNECTIVE TISSUE – References to Vänerply

[162] 1. The July 22, 2010 written unsworn response of Premier Graham to the April 7, 2010 affidavit of MLA Claude Williams admits:

Alan Graham was a Director of Vanerply AB for approximately nine or ten years resigning in May 2009. He was never a shareholder. I had no knowledge of my father's responsibilities or his remuneration. Alan Graham has not otherwise been a Director or Shareholder of Atcon Group during any period since I have been Premier of the Province of New Brunswick.

[Underlining in original]

[163] 2. Premier Graham testified that he had known Robbie Tozer since the early 2000's; that his brother, Andrew Graham, worked for Mr. Tozer's company for a number of years; that his father, Alan Graham, worked for Mr. Tozer following Alan Graham's retirement from public office in 1998; that his father worked for a number of years in the plywood mill in Sweden because he recalled that his father

would be out of the country on numerous occasions travelling abroad. (Transcript A, pp. 1493-1494 Exhibit Book, Part 2).

[164] 3. Premier Graham testified that when his father retired he replaced him as MLA and that his father was a director of Vänerply in Sweden, a veneer plywood company owned by Robbie Tozer, the owner of the Atcon Group but had no knowledge of his father's remuneration. (Transcript B, pp. 1527-1529 Exhibit Book, Part 2).

[165] 4. Premier Graham testified that his father had known Robbie Tozer for a number of years as a friend when his father was Minister of Natural Resources. Mr. Tozer bought the old Burchill mill and that is where the acquaintanceship started. (Transcript C, 1534-1535 Exhibit Book, Part 2)

[166] 5. With respect to his father being a director of Vänerply the Premier testified:

A. There was no potential conflict that I was aware of, so there was no thought given to it.

Q. When you were Premier and, and by 2008 and 2009 what was your knowledge as to whether he remained a director?

A. I knew that he was no longer travelling to Sweden so I, I thought that he was no longer involved with the Atcon Group.

Transcript May 25, 2011

[Pages 1533-1534]

[167] 6. Premier Graham made a false assumption that his father was no longer involved with Vänerply whereas Alan Graham presumed that his son did know. He testified as follows:

Q. Okay. We'll come back to that. Was your son, Shawn Graham, aware of your association with Vanerply?

A. I would presume so because I'd been involved with Vanerply for almost 10 years and he would have...when we first...when Vanerply was first purchased, I spent...I think I did six trips to Sweden in six months,...

...And yes, I mean even before he was...when he was just an MLA, he was aware that his father would be in Sweden once in a while, so he knew that that was going on. Yes.

Transcript May 17, 2011

[Page 1368]

[168] 7. The Premier testified that he had no concerns about being the chair of the Cabinet meetings dealing with Atcon. He testified that he

had very limited knowledge that my father had involved...been involved with the Atcon Group. I knew that earlier following his retirement he was involved in Sweden, but I felt that the Sweden operation, that it had no impact here in New Brunswick with New Brunswick operation. We never discussed any of the work here in New Brunswick. I knew that the opposition may actually try to raise the issue of my brother, who had worked for the Atcon Group for a number of years but had left after having, I guess, concerns over remuneration.

Transcript May 25, 2011

[Page 1542]

[169] 8. Premier Graham testified that he chaired the meetings of the Executive Council dealing with the Atcon financial aid and when he was asked whether any civil servant or other person associated with Cabinet suggested he step aside, he testified as follows when questioned by his counsel Allison Whitehead, Q.C.:

A. It was never raised.

Q. What benefit or opportunity did you believe the granting of these loan guarantees relating to Tozer and his companies in 2008 and 2009 bestowed upon your father?

A. None whatsoever.

Q. And again, what knowledge do you now have of remuneration to Mr. Graham, to Alan?

A. I have no knowledge of the remuneration that's being received or was received.

Transcript May 25, 2011

[Page 1543]

[170] 9. With respect to the allegation that his participation in Cabinet on the decisions made for financial assistance to the Atcon Group gave an opportunity to further his father's private interest, the Premier said:

So when these decisions were made, I want to be very clear that never did I think that it would...to further the interests of a family member.

Transcript May 25, 2011

[Page 1549]

[171] 10. The Premier testified that he was not aware that his father was getting paid by Atcon as a director and consultant up to an including the year 2010. With respect to not verifying whether his father was a director of Vänerply he testified:

Q. But you can understand the optics of this? It is possible to do a search and find out quite easily that your father was a director of Vanerply and when that search was done it, it, obviously, on its face appears to be a conflict.

A. Again, the, the alleged conflict that is before us today was raised, you know, in a political environment.

Q. Um-hmm.

A. We were getting ready to go into an election campaign, as you appreciate. But the decision was based solely on helping this company as a number of companies.

Transcript May 25, 2011

[Pages 1553-1554]

[172] 11. The Premier testified that [by choice] he never discussed business or politics at home:

Many of the decisions that were made, as evidenced by the MECs [Memorandums to Executive Council] and the decision of the Executive Council that we're going to look at, dealt with Vanerply directly in that a major condition was that you, to use the words of the MECs, "monetize..."

A. Um-hmm.

Q. "...the Swedish interests." That you monetize Brunway, that this money was to come back in. And given that there was so much involvement of Vanerply in the decisions to help Atcon did you not feel there was a conflict of interest?

A. Well, as I said, we never discussed politics or business at home...

Q. Right.

A....when I was home. So I was never under any impression that my father was still involved with Vanerply. I want to be very clear that the decision of government to monetize these, we were trying to minimize the risk...

Q. Mmm.

A....for the rate pay...for the taxpayers.

Transcript May 25, 2011

[Pages 1555-1556]

[173] 12. Why did he not call his father and ask about being a director of Vänerply?

Q. Right. But given the high profile nature of your position and given the fact that you were promoting transparency in government, why would you not have called your father or sent him an e-mail and said, "Are you no longer involved with Vanerply? This could get embarrassing." Why, why didn't you do that?

A. And as a family we made a decision, you know, not to talk politics, not to, you know – and we tackled some pretty big

issues – and I wanted to respect that level...and I also had confidence in my father that he would take any appropriate decisions if there was any at any point in time. So, you know, I, I based these decisions on the information that I had and I want to be very clear that when it was raised in the Legislature we took immediate steps to find the answer to the question and that's when we were informed that he was no longer involved with Vanerply, that he had made the decision to step down so we felt that we'd answered that question appropriately.

Transcript May 25, 2011
[Pages 1558-1559]

[174] 13. The presence of Vänerply as an Atcon asset was prominently before the Executive Council under the chairmanship of Premier Graham as early as April 3, 2008, when Atcon sought assistance to guarantee “the repayment of a loan” not to exceed \$13,362,845. This turned out to be a three-year guarantee for a letter of credit. Business New Brunswick recommended that Atcon not be permitted to make any further requests for financial assistance until the guarantee was released. (Exhibit 118, Privileged)

“VÄNERPLY” AT THE EXECUTIVE COUNCIL

[175] Atcon's request for \$50 million in financial aid by the Atcon Group was pursued through 2009 and 2010.

- (1) March 13, 2009, the New Brunswick Industrial Development Board recommended that the Executive Council assist Atcon provided Atcon agree to ten conditions including the sale of Vänerply as follows: An undertaking to sell or otherwise monetize the Swedish assets as quickly as possible, but in no event later than July 31, 2010, with all proceeds being applied to the Minister's guaranteed loans. The Minister is to be provided with monthly progress reports from the firm which has been engaged to sell the assets, and the company shall undertake not to reject any offer of \$18 million or more. Atcon was described as high risk.
- (2) March 26, 2009, the Executive Council dealt with Atcon's \$50 million dollar request for financial assistance being \$10 million to complete a building, \$20 million to pay out McKenna Gale's 18-20% high interest and \$20 million for operating capital. The Board of Management said that

assistance should include selling or otherwise monetizing Vänerply assets. Atcon was described in the Memorandum to Executive Council by Business New Brunswick as high risk which also stated:

- Atcon is a major employer in the area with an annual payroll of some \$70 million, and the company's employment efforts have gone unrecognized as most of the work is taking place in Alberta and northern Canada.
- 80 percent of Atcon's revenues are derived through Atcon Construction, a sector not normally supported by BNB. Provision of assistance to Atcon may result in requests from other construction companies.
- The vast majority of the construction revenues are generated outside of New Brunswick, using NB labour and generating wealth for New Brunswickers and tax revenues for NB.
- Inability of the company to access credit will limit the company's operations and could lead to a major downsizing of the company. The company's current \$40 million operating line of credit is fully extended. The company is already in the process of reducing its fixed overhead expenses.
- Atcon is confident that it can achieve its 2009 forecast of \$279 million in revenues and pre-tax profit of \$22 million. However, Atcon's profitability in recent years has been marginal. An independent review of the company's balance sheet assets to ensure that there are no hidden losses is recommended prior to providing assistance.
- Atcon has a dismal record of meeting its payment obligations to BNB.

- The recent acquisition (by lease) of a corporate jet will create a perception issue if assistance is provided.
 - The requested \$10 million to complete the Atcon Industrial Services project in Miramichi has been necessitated by a \$9 million cost over-run of an \$11 million project. This resulted from the company's decision to expand the scope (and cost) of the proposed project without the knowledge of BNB and without securing the required financing to fund the incremental work.
 - The requested \$20 million working capital guarantee relates primarily to requirements associated with construction activities (a sector not normally supported by Business New Brunswick).
 - The company continues to embark on projects beyond its financial capabilities and then seeks provincial support after the fact.
 - Accounts payable over 90 days old amounted to \$26 million in February, 2009. Ongoing supplier credit will be essential.
- (3) On April 23, 2009, the \$50 million dollar guarantee was again before the Executive Council chaired by Premier Graham to modify the \$20 million dollar operating loan on the Bank of Nova Scotia's insistence from revolving credit to a four year term loan, a benefit to Atcon but riskier for the province. Vänerply is again mentioned: "...sell or otherwise monetize the Swedish assets as quickly as possible...the Minister is to be provided with monthly progress reports from the firm which has been engaged to sell the assets..." Risk assessment: High.
- (4) June 4, 2009, the Executive Council under the chairmanship of Premier Graham dealt with an amendment concerning competition in the province between Atcon and other contractors. Again the sale of Vänerply was in the material to be dealt with by the Cabinet.

- (5) August 13, 2009, as Atcon's financial woes continued, the Executive Council under the chairmanship of Premier Graham approved a change so that \$2 million designated for capital projects be disbursed for working capital. On Schedule "E", Vänerply is prominently shown on the first line of Atcon Group Inc.'s holdings.
- (6) September 2, 2009, Business New Brunswick and the Board of Management rejected Atcon's restructuring request to release security held by Business New Brunswick in favour of the Bank of Nova Scotia. The security in question was the Brun-Way contract worth about \$8 million and Vänerply worth about \$25 million. Chair of the meeting was Premier Graham.
- (7) September 11, 2009 the Cabinet reversed its September 2 decision. The Bank of Nova Scotia would i) rank in first position for Bank advances in excess of \$28.5 million; ii) share security with the Province on a 50/50 basis for operating loan amounts between \$10 million and \$28.5 million; and iii) release all of the security to the Province once the guaranteed Bank loan is reduced by \$10 million. The attendance record for this meeting was missing but the Premier testified that if he was present, he chaired the meeting. The former Clerk of the Executive Council, David Ferguson, testified that the Premier was present and chaired the meeting of September 11, 2009. (Transcript April 5, 2011, page 1122)

ANALYSIS

[176] In defense of the allegation that he breached s. 4 of the *Members' Conflict of Interest Act* by participating in the granting of guarantees Premier Graham relies upon several arguments that can be summarized as follows:

1. There is no evidence that he benefited directly or indirectly by way of furthering his own private interest.
2. He was unaware of his father's involvement with Vanerply or the Atcon Group.
3. The private interest of his father, Alan Graham, is excluded under the *Act* because his father was one of a broad class of persons who, like all other Atcon employees, would benefit in the continuation in business of the Atcon companies.
4. That s. 41(3) of the *Act* concerning triviality, inadvertence and an error in judgment made in good faith may apply.

[177] I agree with the Premier's argument that there is no evidence before the inquiry that he benefited directly or indirectly due to his participation in presiding over the numerous meetings of the Executive Council in granting guarantees to the Atcon Group in 2008, 2009 and 2010. Even to argue that he might benefit indirectly on a father-son basis is tenuous and unconvincing.

[178] In order to deal with the question of whether his participation in the granting of guarantees provided the opportunity to further the private interest of his father, it is necessary to revisit the pertinent sections in play alleging the breach.

Conflict of interest

4 A member shall not make a decision or participate in making a decision in the execution of his or her office if the member knows or reasonably should know that in the making of the decision there is the opportunity to further the member's private interest or to further another person's private interest.

Stripped of its incidental wording, s. 4 becomes:

A member shall not participate in making a decision in the execution of his office if the member reasonably should know that in the making of the decision there is the opportunity to further another person's private interest.

Principles

[179] A former Conflict of Interest Commissioner, the late the Honourable Stuart G. Stratton Q.C. in a report absolving Margaret-Ann Blaney, December 5, 2000, stated at page 6:

I would recommend that Members not forget that the primary objective and purpose for the enactment of the *Members' Conflict of Interest Act* was to enhance public confidence in the integrity of government and its office holders by the prohibition of conflicts between the Member's office and powers and the Member's private interest.

[180] The Premier testified that he presided over the meetings of the Executive Council and that he supported the guarantees in favour of the Atcon Group. The question to be answered is whether the evidence demonstrates that the Premier reasonably should have known that his participation opened up the opportunity to further his father's private interest in the continued operation of the Atcon Group.

[181] The evidence is that the Premier knew that Alan Graham was a personal friend of Robert Tozer and did business with Robert Tozer and his Atcon companies after Mr. Graham retired from many years as a high ranking government member where he had

served as Minister of Natural Resources and Energy and Deputy Premier of the Province. The Premier also knew that his father had been a director of Vänerply in Sweden, an Atcon related company and that the Premier's brother, Andrew, had worked for Atcon.

[182] Thanks to the work of Alan Graham the Vänerply company was one of the profitable companies in the Atcon Group. It was mentioned by name or its Swedish location in every one of the presentations of the \$50 million Atcon claim for financial assistance. Vänerply was particularly singled out several times as its value was recognized either to monetize its worth for sale purposes or to use the asset as a tool in order to persuade the Bank of Nova Scotia to advance more funds to Atcon.

[183] The Premier testified that although he knew that his father had been a director of Vänerply in the early 2000's he "thought" that he was no longer involved because his father was not travelling to Sweden any more. The operative word is "thought":

Q. As, as Premier and as a member of the Cabinet, what, if any, consideration did you give to any possible conflict you had as a result of your father being a director of Vanerply?

A. There was no potential conflict that I was aware of, so there was no thought given to it.

Q. When you were Premier and, and by 2008 and 2009 what was your knowledge as to whether he remained a director?

A. I knew that he was no longer travelling to Sweden so I, I thought that he was no longer involved with the Atcon Group.

Transcript May 25, 2011
[Pages 1533-1534]

[184] Despite what the Premier thought, or did not think, an e-mail from Alan Graham to Leo Persson of Vänerply dated May 30, 2008 showed that he was still traveling to Sweden in 2008. This is the same year the Executive Council granted a guarantee of more than \$13 million to the Atcon Group: E-mails received from Ernst & Young between Alan Graham & Leo Persson Exhibit Book, Part 2.

Ämne: Re : Sale press
Från: "Alan & Connie Graham" <grahamexport@gmail.com>
Datum: Thu, 5 Jun 2008 09:14:39 – 0300
Till: "Leo Persson" <leo.persson@vanerply.se>

Leo
Sorry if I sounded a little impatient on the issue but it is important to get rid of the press now as we will have to get it out of the plant this year

As for Paul I appreciate the effort he has been providing but he must work harder to get it moved
Please keep me posted
Regards
Alan

On Fri, May 30, 2008 at 10:59 AM, Leo Persson
<leo.persson@vanerply.se> wrote:

You have got the answer from Paul regarding the press. Alan, I'm little surpriced for second e-mail to Paul. Both Paul and I would like to sell the press, no question about that. Paul still in the payroll and I give him some time to look after other emplyment. If not we have to reduce him and he know that.

Have a need week-end
Leo Persson

Alan & Connie Graham skrev:

Leo
Can you give me an update on the sale of the press at Swedlam?
We will have to get it moved this summer and the sale directly is the preferable way to go
Gerald needs the space where it is and is getting very impatient at the slowness we are moving
Have you got an answer for me on whether the Swedish Development Crop can finance it if it is sold out of the country?
Also what is status of Paul is he still on payroll or have you given him his notice to look for other employment? We discussed these issues back in January when I was in Sweden and I would like to follow up for Robbie
Please advise
Alan [Emphasis added]

SILENCE IS GOLDEN---OR IS IT?

[185] He did not speak to his father about politics and his father did not speak to him about politics. Both categorically denied that either spoke to the other about the Atcon guarantees. Similarly Robert Tozer did not speak to his company's director, person on retainer and paid consultant, Alan Graham, and Alan Graham did not speak to Robert Tozer about the loan guarantees according to their respective testimonies.

[186] The code of political silence between the father and son was initiated between them independently and for the purpose of family peace and unity. Although the alleged breach of the *Act* has a political background the breach is an allegation of a conflict of interest

involving seasoned veterans at the highest level, not a case where proprieties of silence between them could or should dominate.

[187] Supposing the mutual understanding of silence persisted, it would have been quite simple for the Premier to instruct or request that one of his assistants, colleagues or public servants verify that his father was or was not involved.

[188] In a further alternative, access to s. 30 of the *Act* was available to ask the Commissioner for advice on whether the facts raised a potential conflict of interest.

[189] Given the history of Alan Graham and the Tozer Atcon Group known to the Premier, including the fact that the Premier knew that at one time his father was a director of Vänerply, it is unreasonable to assume that a Member of the Legislative Assembly charged with the duty of avoiding certain decisions in the execution of his office as set forth in section 4 of the *Members' Conflict of Interest Act* does not have any responsibility to verify the current status of the individual in question, his father, and that person's private interest. There was a duty on the Premier to exercise due diligence in verifying the status of his father's relationships in the Atcon Group.

[190] Earlier I had discounted the direct knowledge aspect of the Premier when I reduced section 4 to its essentials with respect to the alleged breach. The real question was whether in participating in the decision he "reasonably should know" it gave rise to the opportunity to further his father's private interest. To "reasonably should know" adds a whole new dimension to the member's responsibility. The test is objective. What would a reasonable person, possessed of the facts known to the member at the time, conclude? In determining his obligation under s. 4 what was the Premier's obligation, if any, to verify the current status of his father's relationship to the Atcon file, knowing the previous history established by the evidence?

[191] I find that Shawn Michael Graham, the Member of the Legislative Assembly, in question, given the facts known of the earlier relationship between Alan Graham, Robert Tozer and Vänerply and the Atcon companies, had an obligation to verify the subsequent status of Alan Graham's position with the Atcon Group seeking guarantees of \$50 million. When a person is possessed of certain historical facts and then makes an assumption, without any attempt at verification, the person runs the risk that the ill-founded assumption is dead wrong.

[192] I resist the argument of counsel to the inquiry that the Premier was willfully blind. In minimizing his previous knowledge based upon an erroneous assumption, the Premier reasonably should have known that he was sailing close to the wind and possibly could be caught up in a finding of willful blindness or even something just short of recklessness.

[193] The evidence, however, does not satisfy the proof required to show that the Premier was willfully blind when he failed to pursue the current status of his father's association

with Vänerpoly and the Atcon Group. However, his dereliction amounts to a high level of blindness approaching indifference.

SECTION 41(3) BREACH: TRIVIAL OR INADVERTENT OR ERROR OF JUDGMENT

41(3) If the Commissioner determines that a breach occurred although the member took all reasonable measures to prevent it, or that a breach occurred that was trivial or committed through inadvertence or an error of judgment made in good faith, the Commissioner shall so state in the report and shall recommend that no sanction be imposed.

[194] The Premier's testimony that he did not give his participation in the decisions any thought negatives the argument that a breach of s. 4 was trivial, inadvertent or an error of judgment made in good faith under s. 41(3). Having given it no thought, as he reasonably should have, it cannot be unintentional. The evidence also establishes that he reasonably should have known that the opportunity to further his father's financial and business interests existed. The Premier's failure to check, based upon the facts already in his possession, negatives the good faith argument. He could easily have ascertained the conflict and taken preventative action. It was his responsibility. He chose not to know when he reasonably should have.

[195] What would the Premier have learned if he had spoken to his father to verify the current status of his father with respect to Vänerpoly? He would have learned that not only was his father still, after nine or ten years, a director of Vänerpoly, he was on retainer with various Atcon companies and was a paid consultant with Vänerpoly and other Atcon companies, the very companies that were applying for loan guarantees of \$50 million. Depending upon when the Premier checked with his father he would have found out that despite Alan Graham's letter of resignation from Vänerpoly dated May 15, 2009, addressed to Atcon Management that he had not resigned from his retainer and consulting positions with the Atcon Group and that he was still regularly involved with the management of Vänerpoly.

[196] Alan Graham was fully active in 2008 when the Deh Cho Bridge guarantee for in excess of \$13-million was granted and in 2009 until his letter of resignation. After his letter of resignation he was still on retainer and acting as a consultant for Atcon companies. It is disturbing that when Alan Graham was asked by a representative of the Premier whether he was still a director of Vänerpoly and he produced a copy of his May 15, 2009 letter of resignation addressed to Atcon Management, he did not inform the representative that he remained involved with the Atcon Group the rest of 2009 to the extent of billing up to and including December 31 although he testified that these were submitted in error and the two December 31, 2009 billings were cancelled by him February 24, 2010. By submitting the December 2009 invoices he must certainly have believed, at the time, that he was entitled to the money despite his subsequent change of mind.

[197] In failing to follow up with his father about the father's current status and thus satisfy the obligation of what a reasonable person should know about the Cabinet decisions being made the Premier remained, of his own choosing, passively uninformed. This, in my opinion, places the facts of the alleged breach in a category governed by the objective evidence of a person who reasonably should have known that his participation gave rise to the opportunity of furthering the financial and business interests of his father.

THE BROAD CLASS OF PERSONS

[198] One of the arguments presented is that s. 4 has not been breached because any private interest of Alan Graham that was being furthered was to him as one of a broad class of persons. The contention is that the assistance given through the guarantees provided money so that the Atcon Group could stay in business and pay their employees. The definition section defines "private interest" by describing what it is not:

S. 1 In this Act...

"private interest" does not include an interest in a matter

- (a) that is of general public application,
- (b) that affects a person as one of a broad class of persons, or
- (c) that concerns the remuneration and benefits of a member or an officer or employee of the Assembly;

[199] In 2009 the number of personnel had fallen to about 360. The argument is that Alan Graham falls within a "broad class of persons" affected, that is, he would be one of at least 360 people employed or receiving remuneration from Atcon. The flaw in the argument is that Alan Graham was not in the broad class described. He was not an employee with various wage deductions and contributions to employee plans. He was in an exclusive class of directors with only Robert Tozer and one or two Swedish personnel as required by Swedish law. Similarly, he was unique in that he was on retainer and was a paid consultant.

[200] There has been a tendency by commissioners to give the words "broad class" an expansive interpretation, and rightly so, but not an exaggerated one. Mr. Graham was in an exclusive group of a few as directors, or one as a consultant, and cannot by some mental by-pass, be arbitrarily included in the broad class as argued.

[201] What should the Premier have done with the knowledge that his father was a director of Vänérply, on retainer and an Atcon consultant?

[202] First, let me make it clear, it would be a conflict of interest if the Premier reasonably should have known that in participating in the decisions granting financial assistance to Atcon Holdings Inc. for which his father was a Vänérply director or an Atcon company consultant or on retainer with Vänérply or any Atcon company there was the opportunity to further the father's private interest.

[203] In coming to this conclusion I am focusing on the year 2009 and specifically the Order in Council 2009-130 of March 26 and subsequent changes to the financing.

[204] There is a well-recognized procedure for any Cabinet minister who finds him or herself in a conflict of interest position. The procedure is set forth in s. 15 of the *Members' Conflict of Interest Act*. The minister asks the Premier to appoint another minister to handle the matter in contention. Simply put, the Premier himself would request another minister to chair the Executive Council for any matters involving the Atcon related companies while his father was still involved in any of the capacities of director, person on retainer or consultant. The appointment itself would be made under s. 3 of the *Executive Council Act*.

[205] Given the knowledge of the Premier in 2009 of the history of his father's government, professional, personal, social and business association with Robert Tozer and his companies stretching back to the time his father was a Cabinet minister and, in particular, following his retirement from his political career; and given the knowledge that the Premier possessed of his father's position as a director of Vänerply; given the imperative introductory wording of s. 4 (a member shall not); and given the objective test wording of s. 4 (if the member... reasonably should know) I find, for the reasons given in this report, that Premier Graham was in a conflict of interest when he participated in the Executive Council decision, to wit, Order in Council 2009-130 dated March 26, 2009 providing financial assistance to Atcon Holdings Inc. thus giving the opportunity to further his father's private interest as a director, consultant and person on retainer. I am satisfied that the preponderance of evidence before me firmly establishes the breach of section 4.

[206] Having found that the former Premier was in a conflict of interest were there mitigating circumstances that would explain his departure from the norm? I think there were. In his testimony he referred to the pressures of the position, the pressures to help the Miramichi devastated by the loss of its traditional industries. He illustrated his concerns by reference to a policy shift from job creation to job retention. He emphasized that his focus was never on his father but on saving jobs because the government was seen in this case as the financial source of last resort. There was not only overwhelming pressure from his Miramichi and north shore colleagues to help the area and a local company, there was pressure from the media to do something. It was a time when the global economy was rapidly deteriorating and he was deeply involved in negotiations with the Province of Québec over the sale of NB Power. He also took into account that political pressure from the opposition was mounting as the fixed date for a provincial election loomed and the dissatisfaction against his government was nothing more than political posturing. One final note in his favour, which is not insignificant, is that he has retained his seat and left the consequences of his conflict of interest to be decided by his peers.

[207] As pointed out earlier in my report, Premier Graham and his counsel cooperated fully in the investigation and inquiry and without hesitation.

[208] There is no doubt that the Executive Council had the power to authorize the guarantees even in the face of the opinion and evidence of Business New Brunswick's personnel. That is the business of government and governing. It may well be that, given the legal wisdom of the day against disclosure, Business New Brunswick's embarrassing reasons for opposition to the guarantees would never have seen the light of day; but they have!

[209] Having reviewed all of the evidence obtained over the past months I have concluded that the advancement of the personal interest of Alan Graham was incidental to the granting of the financial assistance to the Atcon Group. Rightly or wrongly the \$50 million was going to be given to the Tozer companies regardless of any unproven influence that the father could, did or might have had. Whether the same amount of enthusiasm would have exerted itself at the Cabinet level if the Premier had stepped aside, as he should have and not presided over the meetings, is a matter of conjecture.

SANCTIONS

41(1) Where the Commissioner conducts an investigation under section 37 and finds that a member has breached any of sections 4 to 6, 8 to 11 or 13 to 17, inclusive, or has failed to file a gift disclosure statement, a private disclosure statement or a statement of material change within the time provided by this Act or has failed to disclose relevant information in that statement, the Commissioner may recommend

- (a) that the member be reprimanded,
- (b) that the Assembly impose a penalty on a member in an amount recommended by the Commissioner,
- (c) that the member's right to sit and vote in the Assembly be suspended for a specified period or until the fulfillment of a condition, or
- (d) that the member be expelled from membership in the Assembly and the member's seat be declared vacant.

41(2) The Commissioner may also recommend the alternative of a lesser sanction or no sanction if the member carries out the recommendations in the report to rectify the breach.

41(3) If the Commissioner determines that a breach occurred although the member took all reasonable measures to prevent it,

or that a breach occurred that was trivial or committed through inadvertence or an error of judgment made in good faith, the Commissioner shall so state in the report and shall recommend that no sanction be imposed.

[210] A breach of the *Members' Conflict of Interest Act* does not always result in the member receiving a sanction such as where the breach is trivial, committed through inadvertence or an error of judgment made in good faith, all of which I have ruled out. The Premier testified that he gave no thought to his father being a director of Vänerpoly. In fact, he reasonably should have checked to find out whether his father was a director and he would have found out that not only was he still a director when the guarantees were being discussed and then approved, he was on retainer and was a paid consultant with the Atcon Group. Given the multi-factored history of his father with Robert Tozer and various Atcon companies it was incumbent upon him to verify and step aside. The responsibility of office displaced the mere defenses of inadvertence and error in judgment made in good faith.

[211] Members of the Legislative Assembly, ministers more so, must uphold the highest ethical standards so that public confidence and trust in their integrity and impartiality is assured.

[212] Counsel for the inquiry submits that the appropriate sanction would be a reprimand and a fine of \$1,000 to \$2,000 for each of the eight Executive Council meetings at which the Atcon guarantees were considered and at which the Premier presided. I view the matter as one distinct conflict and not otherwise.

[213] In view of the finding that I have made with respect to the primary purpose of the application for \$50 million as testified to by Premier Graham and that the furthering of his father's private interest although serious, was incidental to the financial aid, I recommend that for the member's breach of s. 4 of the *Members' Conflict of Interest Act* he be reprimanded and that a penalty in the amount of \$3,500.00 be imposed upon him.

[214] A reprimand alone in my opinion is insufficient. It should be accompanied by a fine of \$3,500.00 to indicate the seriousness of a breach of s. 4 and the fact that the breach was at the hands of a member of the Executive Council.

[215] It was incumbent upon Premier Graham to honour his duty not to put himself in a situation where interests might conflict with duties. Given the knowledge in his possession of the history of his father with Mr. Robert Tozer and his Atcon interests, it was incumbent on him to observe the import of the cautionary but exacting words in s. 4 "reasonably should know" and simply to have checked with his father where, presumably, he would have been alerted to the advisory role as consultant and on retainer that his father held in several Atcon companies plus his directorship in Vänerpoly. A discreet inquiry by any representative on his behalf, at least, would have raised a red flag and he could have removed himself from any conflictual situation.

[216] As a public office holder a minister must uphold the highest standards so that public confidence and trust in the integrity and impartiality of government are maintained and enhanced.

OTHER RECOMMENDATIONS

[217] That consideration be given to adopting a code of conduct for the members and for ministers. There is no code of conduct to guide the Members of the New Brunswick Legislative Assembly in either the broad or intricate dealings that the members conduct on behalf of the public. What is available to guide them? What guide can they follow or assist them other than the very general *Members' Conflict of Interest Act*? When a thoughtful matter arises they can turn to the Conflict of Interest Commissioner and pose a question but there is no written code that they can resource for routine matters or those of deeper concern upon which much practical and academic thought has been written. It may be time to consider improving the situation. The members are entitled to a well-thought out guide. An enumerated Code of Ethics would facilitate the members understanding in determining their obligations vis-à-vis the public interest. Instead of making a misstep that could be politically crippling or even worse, the member could reference the code and avoid a pitfall. The member would not have to guess or make an educated guess as to a solution to the problem at hand.

[218] My predecessor in office, the late Honourable Stuart Stratton, a retired Chief Justice of the New Brunswick Court of Appeal in the Volpé decision <http://www.gnb.ca/legis/Conflict/investigations/inv092801-e.asp> wrote:

I would respectfully remind those who read this Report that the *Members' Conflict of Interest Act* is legislation enacted to promote public confidence in elected public officials as they conduct public business.

And further on in the Volpé decision he said:

...[I]t is, I think, clear that the Act has been put in place to ensure that Members of the Executive Council and the Legislative Assembly should always adhere to the highest standard of ethics as they go about the people's business.

...clearly under the Act a Cabinet Minister is held to a higher standard of conduct than other Members of the Legislature.

[219] In 1973 the guidelines for public servants in New Brunswick stated that government employees should avoid matters that would put them in a conflict of interest. The political masters went further and advised public servants to avoid *apparent conflicts of interest*. The actual wording of that part of the "Conduct Guide" under the sub-heading of "Integrity" is as follows:

Public servants act honestly, fairly and openly; they honour their commitments; and they do not use public office for private or personal gain.

[...]

Public servants disclose any real or apparent conflicts between their personal or private interests and their official duties.

Public servants resolve any such conflicts in favour of the public interest.

[220] The Office of Human Resources has published a policy statement on conflicts of interest by employees who are not covered by the *Conflict of Interest Act* (Deputy Ministers, Executive Assistants etc.):

Employees shall not engage in any business or transaction of a financial or personal nature that would compromise the fair and honest discharge of their official duties.

There must not be, nor appear to be, any conflict between the private interest of the employee and the employee's responsibility to the public. (Emphasis added).

[221] Should the obligations to the public on the part of members be any less principled than that of public servants? Would the public's answer be any different?

[222] Consideration be given to requesting the Auditor General to conduct an audit of the financial assistance given by the Province of New Brunswick to Robert Tozer and his Atcon Group of companies including recommendations on how to improve the performance of Business New Brunswick. If the Auditor General is so directed, consideration should also be given to preserving all the evidence and information in this inquiry for use of the Auditor General.

CURRENT STATUS OF DEBT TO NEW BRUNSWICK

[223]

February 8, 2012

Via Email

R. Gary Faloon, QC
Counsel to the Graham Inquiry

Gilbert, McGloan, Gillis Offices
22 King St.
PO Box 7174, RPO Brunswick Sq.
Saint John, NB
E2L 4S6

Dear Sir:

RE: Graham Conflict Inquiry

In response to the four questions that Commissioner Ryan has asked you to pose in your letter of 3 February 2012, I can reply as follows:

1 The direct cost to date of 2008 (\$13,362,845.00) and 2009 (\$50,000,000.00) guarantees to Bank of Nova Scotia in support of Atcon Holdings Inc. is \$63,362,845.00. The Province's total direct cost remains as set out in the Exhibits to the evidence adduced during the inquiry.

2 (a) The Province has to date recovered \$20,000.00 as a result of the bankruptcy of the Atcon Companies (sale of real property owned by Atcon Industrial Services Inc. authorized by Court Order in July 2010).

2 (b) The Province has not recovered any monies under Mr. Robert Tozer's personal guarantees.

3 We understand that the Receiver Ernst & Young will shortly be in a position to make an interim disbursement to creditors of the amounts realized to date. We have no up to date information as to the Receiver's accounts or proposed allocation. Our expectation is that the Province's allocation of any interim disbursement will be less than \$1,000,000.00. There is a potential of the Province realizing certain recoveries on the Receivership of Atcon Plywood Inc. but the Court approved sale originally scheduled for October 2011 has still not closed and there appears to be significant difficulties and issues in closing this matter. There may be amounts recovered from the government of the North West Territories but these cannot be quantified until the Deh Cho Bridge deficiencies have been rectified which we do not anticipate prior to the end of the 2012 construction season.

4 The Province does not anticipate any further exposure or liability other than has been disclosed during the inquiry.

I trust this information is sufficiently informative for the Commissioner's purpose. Should you or he have further questions or require further clarification please feel free to ask.

Yours truly,

John B. D. Logan
Director

/sb

cc Bill Levesque
Byron James
Judith Keating, QC

Twenty-Third Report of the Receiver, dated July 25, 2012

[224] The Receiver, Ernst & Young Inc., filed its Twenty-Third report in the Court of Queen's Bench in Bankruptcy and Insolvency at Miramichi on the 25th day of July, 2012.

[225] The report was submitted to the Honourable Thomas W. Riordon by the Receiver's Senior Vice President, Paul D. Hickey, CA. The 54 page report, Tab 58 in this Report to the Speaker, detailed the Atcon properties realized to and including the 25th day of July 2012.

[226] After listing the claims and charges authorized to participate in a distribution, the Receiver set forth a proposed distribution and then made certain recommendations to and requests of the Court.

Order of Justice Thomas W. Riordon, July 31, 2012 – Tab 59

[227] Justice Riordon approved distributions to secured creditors and approved the activities of the Receiver in administering the receivership to date.

[228] The Court ordered payments of the following sums:

\$340,879.90 to the Province of New Brunswick

\$7,314,321.14 to the Bank of Nova Scotia

\$808,629.63 to Caterpillar Financial Services Limited

\$416,074.87 to GE Canada Equipment Financing G.P. and affiliates

\$174,076.42 to Aviva Insurance Company of Canada and affiliates

[229] RSM Richter Inc. report re: Atcon Holdings Inc., after the fact executive summaries are listed at Tab 60.

[230] Updated acknowledgement October 23, 2012 that future recovery of monies will be minimal.

[231]

October 23, 2012

Via Email

R. Gary Faloon, QC
Counsel to the Graham Inquiry
Gilbert, McGloan, Gillis Offices
22 King St.
PO Box 7174, RPO Brunswick Sq.
Saint John, NB
E2L 4S6

Dear Sir:

RE: Graham Conflict Inquiry

I acknowledge receipt of the Commissioner's request for an update on the realization of the Atcon assets sent by you on his behalf this date. You will recall my interim response of February 8, 2012 which, in part, indicated that \$20,000.00 had been received by the Province relating to the disposition of Atcon Industrial Services Inc.'s assets.

Since that time, Ernst & Young in its capacity as receiver, has sought and obtained authority from the Court of Queen's Bench to disburse and has disbursed \$340,879 in favour of the Province relating to its various recovery and realization activities.

PriceWaterhouseCoopers, in its capacity, as receiver of the Atcon Plywood Inc. assets is in receipt of approximately \$570,500 in the form of a forfeited deposit on the aborted sale of the plywood mill. The net amount of this deposit together with whatsoever "forced sale" or liquidation proceeds the plywood mill assets actually generate will be applied firstly to the guaranteed loan obligations of the Province to GE and secondly if funds remain available, to the Provinces direct debt relating to Atcon Plywood Inc. Thus, we anticipate recovery in this regard but cannot be more specific or precise at this time.

With respect to the monies held by the Government of the Northwest Territories, my client is decreasingly confident that there will be monies returned to the Province.

Remediation work on construction deficiencies continues and we do not anticipate closure on this matter until the 2013 construction season.

With respect to the sale of the Vanerply assets, the transaction closed last autumn. I am advised that pursuant to Swedish law no disbursement may be made for a period of twelve months. Whether the Province shall receive any portion of the proceeds of realization will be determined by the provisions of the priorities agreement between the Province and the Bank of Nova Scotia disclosed to the Commissioner and entered into evidence at the Inquiry. I cannot be more specific at this time. My client's expectation is that any recoveries in this regard will be relatively modest.

I trust this information is helpful to the Commissioner.

Yours truly,

John B. D. Logan
Director

/sb

cc Kenneth Cripps

Dated at the City of Fredericton this 14th day of February, 2013.

The Hon. Patrick A.A. Ryan, Q.C.
Commissioner

November 8, 2012, pursuant to s. 40 of the *Members' Conflict of Interest Act*, I met with Shawn Michael Graham and counsel Allison Whitehead, Q.C. to inform the member of the particulars of this report to the Assembly and to hear representations. I considered his representations and concluded that no changes would be made to my report.

The *ratio decidendi* of my report has not changed.

The Hon. Patrick A.A. Ryan, Q.C.
Commissioner