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Chapter 1

Introductory Comments by the Auditor General

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Introductory Comments by the Auditor General

Audit requested by the Legislative Assembly

1.1 I have the honour of presenting my report entitled, “Financial Assistance to Atcon Holdings Inc. and Industry”. This report was prepared in response to the June 2013 unanimous motion of the Legislative Assembly requesting we complete an audit of this area.

Focus of the Audit

1.2 The Province’s past relationship with the Atcon group of companies was complex and spanned multiple government mandates. The focus of our audit was on events surrounding government's decision making process in granting financial assistance to Atcon for the period from 2008 to 2010, as well as how to improve the performance of the Department of Economic Development.

Government decisions caused the taxpayer loss

1.3 The provision of loan guarantees to Atcon, and the subsequent loss incurred by New Brunswick taxpayers, occurred because the government of the day chose to disregard the expert advice of its senior civil servants. Despite numerous recommendations to reject Atcon’s request for assistance, the government provided loan guarantees to the Atcon Group, and then compounded the Province’s risk of loss by giving up its first security position on Acton’s assets in favour of Atcon's bank. Following Atcon’s bankruptcy in April 2010, the Province was left with close to \$70 million in unrecovered funds.

AG respects government’s challenges however, unable to conclude decisions were reasonable in the circumstances

1.4 I have utmost respect for Cabinet’s responsibility for making tough decisions in difficult economic times, including balancing competing priorities such as the maintenance of jobs at taxpayers' expense with proper stewardship of public resources. However, nothing we saw during our examination would support a conclusion that the

decisions taken by government on this file were reasonable in the circumstances. Although we did have access to Cabinet documents, we are unable to provide government's rationale for their decisions. Such rationale was not documented.

Similar situation could happen again

- 1.5** The substantial financial loss to taxpayers in our opinion was totally unnecessary. Unless government sees fit to make changes to the way in which financial assistance to industry is approved at the Cabinet level, I believe a similar situation could happen again. At present, the only impediment for current and future governments is that they will ultimately be held accountable by the electorate for their decision-making.

Challenges in carrying out audit

- 1.6** The passage of time, as well as numerous changes among senior officials in the Department of Economic Development, presented some challenges. However, we were generally pleased with the cooperation provided by both past and current Department management and staff in providing the information we needed to complete our work.

Access to Cabinet documents is not typical but stemmed from 2013 Report of Conflict of Interest Commissioner Report

- 1.7** My office had full access to all evidence from the 2013 Inquiry conducted by the Conflict of Interest Commissioner. It should be noted the frequent and detailed account of cabinet documents and cabinet events contained in this report is not typical of AG reports nor will it be in the future. Such documents are considered to contain "cabinet privileged information" and are not usually cited as a specific source of audit evidence in our reports.

Questions may remain

- 1.8** It should also be noted the focus of our work was in response to the request of the Legislative Assembly. It may not answer all remaining questions the public may have regarding government's involvement with the Atcon Group of Companies, such as the ultimate loss or recovery to the Province given that legal matters are still ongoing.

AG prepared to pursue matter further if required

- 1.9** We did not do a forensic audit, we did not carry out an inquiry, nor did we put anyone under oath during our audit process. Such an extensive exercise, if undertaken by my office, would require additional funding and expertise beyond existing resources. However, I am prepared to pursue future direction on this matter if required by the Legislative Assembly.

Acknowledgements

- 1.10** My staff worked very hard in carrying out the work contained in this Report. This Report is a reflection of their commitment, professionalism and diligence. I would like to express my appreciation for their contribution and continuing dedication to fulfilling the mandate of the Auditor General of New Brunswick.



Kim MacPherson, CPA, CA
Auditor General

Chapter 2

Department of Economic Development

Financial Assistance to Atcon Holdings Inc. and Industry

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Department of Economic Development Financial Assistance to Atcon Holdings Inc. and Industry

Legislative Assembly requests the Auditor General conduct an audit

2.1 In June 2013, the Legislative Assembly adopted the following unanimous motion:

“Be it therefore resolved that this Assembly request the Auditor General of New Brunswick to conduct an audit of all financial assistance given by the Province of New Brunswick to Robert Tozer¹ and the Atcon group of companies, including recommendations on how to improve the performance of the Department of Economic Development, formerly known as Business New Brunswick.”

The complete motion is detailed in Appendix I.

2.2 As a result of the request by the Legislative Assembly, we examined financial assistance granted to the Atcon group of companies as well as certain aspects of the Department of Economic Development’s operations.

¹ Robert Tozer is the President of Atcon Holdings Inc.

Audit objectives

2.3 The objectives of our audit were:

1. *to determine whether the Government exercised due diligence in granting financial assistance to the Atcon group of companies;*
2. *to identify all provincial government organizations that provide financial assistance to industry and determine whether they coordinate their assistance to limit the exposure of the Province;*
3. *to determine whether the Department has implemented recommendations made in previous performance audits of financial assistance to industry performed by our Office; and*
4. *to determine whether the Department publicly reports on the performance of the financial assistance it provides.*

2.4 The audit criteria we used for each objective are listed in Appendix II.

Introduction

2.5 During 2013-2014, the Province spent \$231.4 million on economic development in New Brunswick. Many departments and agencies have programs to support economic development, as shown in Exhibit 2.1. One of these is the Department of Economic Development.

Exhibit 2.1 - Provincial spending on economic development (in millions)

	2013-14	2012-13
Economic Development *	\$ 150.8	\$ 200.4
Tourism, Heritage and Culture	41.9	36.6
Provincial Holdings	10.8	5.8
Invest NB	7.0	4.7
New Brunswick Immigrant Investor Fund (2009) Ltd	5.2	5.0
Provision Expense	5.4	5.8
Post-Secondary Education, Training and Labour	3.9	4.1
Kings Landing Corporation	3.5	3.7
Amortization Expense	2.9	3.0
Total	\$ 231.4	\$ 269.1

Source: 2014 Public Accounts of New Brunswick, Schedule 25 to the Consolidated Financial Statements

* Economic Development also includes amounts for Regional Development Corporation (RDC) and Regional Development Corporation-Special Operating Agency (RDC-SOA). The 2013-14 figure for Economic Development includes \$55.4 million for RDC SOA (2012-13: \$97.9 million) and \$73.9 million for RDC (2012-13: \$78.5 million).

2.6 The Department of Economic Development provides financial assistance to industry through loans, loan guarantees, payroll rebates, non-repayable contributions and forgivable loans under the authority of the *Economic Development Act*. Financial assistance is provided to enable the establishment, maintenance and growth of businesses. In their 2012-2013 annual report, the Department presented a portfolio of 251 accounts valued at \$501.4 million.

Financial assistance to industry is a significant investment by the Province

2.7 Providing financial assistance to industry for the purposes of economic development is a significant investment by the Province. Exhibit 2.2 shows the significant amount of funding approved over the past 10 years in the Department's Financial Assistance to Industry Program. The exhibit reveals that \$952.8 million in assistance to industry was approved through the Department, either through loans, loan guarantees or strategic assistance.²

² Amounts approved for financial assistance could differ from the amount disbursed; for example, a company may decline the department's terms and conditions or decide not to proceed due to a change in circumstances.

*Exhibit 2.2 - Approved financial assistance from the Financial Assistance to Industry Program
(in millions)*

	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	Total
Loans	\$ 24.5	\$ 11.5	\$ 53.5	\$ 17.1	\$110.8	\$ 77.7	\$ 39.2	\$ 45.5	\$ 16.2	\$ 32.9	\$428.9
Loan Guarantees	\$ 51.4	\$ 18.8	\$ 37.1	\$ 19.0	\$ 23.0	\$ 96.3	\$ 36.8	\$ 43.1	\$ 8.5	\$ 2.7	\$336.7
Strategic Assistance	\$ 9.8	\$ 9.2	\$ 15.2	\$ 22.0	\$ 28.6	\$ 8.2	\$ 14.6	\$ 4.5	\$ 18.8	\$ 1.5	\$132.4
Other *	\$ 3.9	\$ 1.2	\$ 0.7	\$ -	\$ 4.8	\$ 0.2	\$ 40.5	\$ -	\$ 3.5	\$ -	\$ 54.8
Total	\$ 89.6	\$ 40.7	\$106.5	\$ 58.1	\$167.2	\$182.4	\$131.1	\$ 93.1	\$ 47.0	\$ 37.1	\$952.8

* Other includes Equity or Contributions

Source: Table prepared by AGNB (Auditor General of New Brunswick) from figures provided by the Department of Economic Development (unaudited)

Financial assistance to Atcon

2.8 The Province has been providing financial assistance to the Atcon group of companies since 1993 as detailed in Exhibit 2.4. Beginning in 2008, the Province granted significant loan guarantees totaling \$63.4 million to Atcon Holdings Inc.:

- In May 2008, the Province provided a guarantee of \$13.4 million for the purpose of securing a letter of credit as required under a construction contract;
- In June 2009, the Province provided a series of loan guarantees to Atcon Holdings Inc. totaling \$50 million dollars [the \$50 million loan guarantee] for the purposes of completing an expansion, replacing existing debt and increasing the company's operating line of credit; and
- Nine months later, in March 2010, the Province was required to pay out the \$50 million guarantee. This was followed by a payout related to the \$13.4 million guarantee in October 2010, for a total payout of \$63.4 million.

Conclusions and results in brief**Atcon has received significant financial assistance from the Department****Cabinet approved Atcon assistance despite significant risk to taxpayers and numerous warnings**

2.9 Since the early 1990's a total of \$77 million in financial assistance has been granted to the Atcon group of companies. We were surprised to note that prior to providing the \$63.4 million in assistance examined in detail in this report, over \$13.9 million in grants, loans and loan guarantees were granted to the Atcon group of companies by the Province.

2.10 In our examination of the \$63.4 million granted to Atcon in 2008 and 2009, we found most internal processes followed by senior government officials generally worked as designed, although we did identify areas for improvement. However, Cabinet approved the \$50 million loan guarantee for Atcon despite significant risks to taxpayers and numerous, repeated warnings by staff at the Department of Economic Development and the New Brunswick Industrial Development Board (NBIDB). These actions are not prohibited by legislation or policy. Neither the Minister nor Cabinet is bound by the recommendations of staff or the NBIDB.

Cabinet displayed a very troubling disregard for taxpayers' money

2.11 We found due diligence was exercised by the Department, although some areas require improvement. We noted Cabinet disregarded advice resulting from the due diligence. We recognize there may be situations where government decisions differ from the advice and recommendations of public servants. Nonetheless, based on our review, there were two critical events that displayed a very troubling disregard for taxpayers' money:

- Approval for funding was granted despite significant risks of loss and numerous objections from senior officials. Although difficult to confirm, it appeared the objective was to maintain jobs; and
- A number of terms and conditions, intended to mitigate the Province's risk were put in place, only to be later removed by Cabinet. Amendments to the security agreements on the \$50 million guarantee were approved that negatively affected the Province's security position on the Atcon guarantee. Once again, the amendments were approved by Cabinet despite objections from senior officials. From our examination, it was known the impact would weaken the Province's security position by millions of dollars. The rationale for this decision is questionable given the outcome transferred the impact of the pending loss from the bank to the taxpayer.

Legal authority to amend security was unclear

2.12 It is unclear if Cabinet had the authority to give approval to amend the security agreement. Given the significant impact, in our opinion, Cabinet's approval did not comply with Regulation 82-197. It should be noted that our view is based on consultations with legal experts. However, the Executive Council Office has indicated they disagree with our interpretation. They believe the Minister had statutory authority to amend the security without any further approvals. Given the diverse interpretations, we have recommended the Act and Regulation be clarified.

No recommendations can prevent another “Atcon” as long as elected officials can influence the decision

2.13 As requested by the Legislative Assembly, we have made recommendations to address system weaknesses. However, it should be noted although our recommendations may mitigate another “Atcon” from occurring, they will not eliminate such an event as long as elected officials can influence the decision to provide financial assistance to companies. We recognize Cabinet has responsibility for making tough decisions in difficult economic times and must weigh competing interests, such as job maintenance and risk to taxpayers.

Ongoing Issues:

Litigation against Atcon auditors;

Robert Tozer personal guarantee;

Professional conduct complaint.

2.14 In June 2014, the Province of New Brunswick commenced legal proceedings against the auditors of Atcon Holdings. We have been advised that statements of claim and defense have been filed, and the next step is for the parties to prepare and exchange Affidavits of Documents before scheduling Examinations for Discovery. Although a personal guarantee by Robert Tozer was a condition of assistance, at the time of our audit the Province had not pursued the personal guarantee as title to it belonged to the Bank of Nova Scotia. In addition, a professional conduct complaint was made by the Province to the New Brunswick Institute of Chartered Accountants (NBICA)³ in the Atcon matter. We have been advised the Complaints Committee is at the document/evidence gathering stage of its investigation.

No monitoring to limit the exposure of the Province

2.15 We also found the Province does not monitor total financial assistance provided to individual companies. There are at least six departments/agencies that provide various forms of financial assistance. These entities do not actively coordinate their efforts to limit the exposure to the Province, except in limited circumstances. Significant exposure from a single company is a risk to the Province as default can result in a significant financial loss to taxpayers.

³ As of September 1, 2014, this organization became the Chartered Professional Accountants of New Brunswick (CPA New Brunswick).

Many past Auditor General recommendations have not been implemented

2.16 In addition to our recommendations to improve the performance of the Department, we have also recommended government streamline the number of organizations delivering financial assistance to industry, to monitor and set limits on the extent of funding provided by all agencies to any one company, and to ensure our recommendations apply to all provincial departments and agencies delivering financial assistance.

2.17 When we followed up on past Auditor General recommendations made in previous performance audits of financial assistance to industry, we found the Department has not implemented 14 of 36 former recommendations made by our office.

2.18 We found the Department has implemented only 29% of recommendations from our 2010 performance audit and 69% from the 1998 audit. Similar recommendations are once again made in this report.

2.19 Because not all recommendations were implemented, we believe areas of weakness persist:

- The requirement to verify client claims and assertions (other than audited financial statements), as well as documenting the work performed, is at the discretion of the loan officer;
- There are no benchmark acceptance levels for evaluating applications; and
- There is poor performance reporting in the annual report on the success of the financial assistance to industry programs.

Approximately \$1 billion in financial assistance was approved by the Department over the last 10 years without any formal objectives

2.20 The Department does not report internally or publicly in its annual report, on the actual performance of its financial assistance to industry programs even though significant investments are made each year (\$952.8 million has been approved for economic development over the past 10 years). Neither the government nor the public can assess if this funding is achieving the intended objectives as no formal objectives exist.

Past internal review by the Office of the Comptroller revealed poor value for money

2.21 The only analysis we found that assessed the actual performance of the department's loans, loan guarantees and strategic assistance was an analysis prepared by the Office of the Comptroller in 2010. Though we did not audit this internal analysis, it raises concerns about the performance of the financial assistance issued by the Department. It noted:

- only 53% of the jobs target was achieved on almost \$300 million in assistance;
- overall cost of \$25,600 per actual job created and maintained was 86% higher than the expected cost of \$13,700; and
- 41% of the \$700 million in assistance granted between 2001 and 2009 was categorized as unsuccessful or doubtful.⁴

2.22 These findings demonstrate the actual performance of financial assistance to industry can and should be tracked and reported by the Department in order to determine whether this is an effective use of taxpayers' money and whether intended objectives are being achieved.

⁴ Success was described as completing the financing terms and meeting the terms approved by Cabinet.

Example of good performance reporting at Invest NB

2.23 Invest NB is an agency that provided financial assistance to industry at the time of our audit. The reporting presented by Invest NB is an example of a best practice within government. The agency reports on its performance using a number of key indicators such as the number of new investments, direct employment from investments, average salary for new jobs created and the return on taxpayers money. Their annual report also states that performance measurements used are based on actual results.

Recommendations

2.24 A summary of our recommendations can be found in Exhibit 2.3

Exhibit 2.3 - Summary of Recommendations

Recommendations	Department's Response	Target Date for Implementation
Objective 1: to determine whether the Government exercised due diligence in granting financial assistance to the Atcon group of companies.		
<p>2.38 We recommend the Department establish clear guidelines for applications for assistance with documented analysis maintained in the client file to ensure decisions are supported.</p>	<p><i>As part of the operational transition to the new Crown Corporation – Opportunities NB (ONB), guidelines to support required information supporting requests for financial assistance will be developed.</i></p> <p><i>It is anticipated that standardized scoring will be implemented reflecting the analysis undertaken on a per file basis as well as collectively within each fiscal year. This information would be maintained in client files.</i></p>	<p>October 1, 2015</p>
<p>2.39 We recommend the Department ensure all requests for assistance include an application properly prepared and signed as complete and accurate by the client.</p>	<p><i>The General Regulation under the pending Opportunities NB Act (Bill 6) will provide general parameters for applications, providing the legal framework for the guidelines referenced in 2.38.</i></p> <p><i>The Regulation will also seek to address financial assistance supporting foreign direct investment or other initiatives which are supported by ONB-generated proposals rather than application forms.</i></p>	<p>April 1, 2015</p>

Exhibit 2.3 - Summary of Recommendations

Recommendations	Department's Response	Target Date for Implementation
Objective 1: to determine whether the Government exercised due diligence in granting financial assistance to the Atcon group of companies. (continued)		
<p>2.41 We recommend the Department establish minimum standards and criteria, such as number of jobs to be created or maintained per dollar advanced, for use in evaluating applications for assistance.</p>	<p><i>Per 2.38 above, it is anticipated that standardized scoring will be implemented reflecting the analysis undertaken on per file basis as well as collectively within each fiscal year.</i></p> <p><i>The Province's economic targets are to be set by the standing Cabinet Committee - Jobs Board, including number of new jobs created across the Province's entities. ONB will establish metrics to meet these and other targets.</i></p>	<p><i>October 1, 2015</i></p>
<p>2.45 We recommend the Department include a complete version of the most recent audited financial statements with Memorandums to Executive Council requesting financial assistance.</p>	<p><i>The Department has been following this practice for several years.</i></p>	<p><i>Previously implemented</i></p>
<p>2.57 We recommend the financial considerations included in the Memorandum to Executive Council clearly state the financial impact on the accounts of the Province, including the need for a provision for loss.</p>	<p><i>The Department has been following this practice for several years.</i></p>	<p><i>Previously implemented</i></p>
<p>2.61 To improve future economic development decision making, we recommend the Department quantify the risks and rewards to the Province in order to clearly establish and balance the value received for the output of funding and the risk assumed by the Province.</p>	<p><i>As a matter of operating practice, decision-makers are provided with information relating to risk. To augment the current approach, part of the 'scoring process' referenced in 2.38, is anticipated to assess and measure risk and benefits to the Province for all proposals evaluated.</i></p>	<p><i>October 1, 2015</i></p>

Exhibit 2.3 - Summary of Recommendations (continued)

Recommendations	Department's Response	Target Date for Implementation
Objective 1: to determine whether the Government exercised due diligence in granting financial assistance to the Atcon group of companies. (continued)		
2.64 We recommend the Department establish guidelines for verification of claims and assumptions underlying projections included in applications for financial assistance.	<i>In Fall 2014, a Reference Guide was adopted which guides department staff in the completion of due diligence. A copy of this guide has been provided to the Office of the Auditor General.</i>	<i>Previously implemented</i>
2.65 We recommend all claims of job creation or maintenance, in connection with the application, be made in writing, supported by documentation and signed by a company representative indicating the accuracy of the documentation and the company's commitment.	<i>Applicants must sign an application which normally references the company's business plan and financial projections. This will be addressed in the future as explained in our response to 2.38.</i>	<i>April 1, 2015</i>
2.72 We recommend the Department, in collaboration with others, propose an update to the <i>Economic Development Act</i> and Regulation to clarify the authority to amend security.	<i>The Economic Development Act will be repealed upon proclamation of the Opportunities New Brunswick Act. We currently anticipate that this will occur on April 1, 2015. ONB will have full discretion with respect to modifying its security. However, responsibility for these decisions will rest with the Board of Directors of ONB who will be versed in risk management.</i>	<i>April 1, 2015</i>

Exhibit 2.3 - Summary of Recommendations (continued)

Recommendations	Department's Response	Target Date for Implementation
Objective 1: to determine whether the Government exercised due diligence in granting financial assistance to the Atcon group of companies. (continued)		
<p>2.82 Where it would improve the security taken by the Province on loan agreements, we recommend the Department seek an independent assessment of assets when assets are provided as security on loan or guarantee agreements, especially where the value is significant. Should further financial assistance be requested, the Department should reassess the value of these assets as this may affect the realizable value of the security.</p>	<p><i>We agree to seek independent valuations of security in cases where the value is significant.</i></p>	<p><i>April 1, 2015</i></p>
<p>2.83 When personal guarantees are provided, we recommend the Province ensure there is adequate evidence to support the value of the personal assets such that there is sufficient net worth to safeguard taxpayers' money.</p>	<p><i>We agree to be more diligent in this area.</i></p>	<p><i>April 1, 2015</i></p>
<p>2.85 We recommend the Department clearly identify companies and individuals involved in past defaults on government financial assistance as part of the Memorandum to Executive Council (MEC). Where there is a recommendation to approve assistance to such a company or individual, the justification should be clearly stated on the MEC.</p>	<p><i>We agree with including this information as part of any MEC. We also agree with justifying assistance in such cases.</i></p>	<p><i>April 1, 2015</i></p>
Objective 2: to identify all provincial government organizations that provide financial assistance to industry and determine whether they coordinate their assistance to limit the exposure of the Province.		
<p>2.95 We recommend the Department establish a limit on the amount of assistance/level of provincial exposure that can be granted to a single company or group of related companies.</p>	<p><i>This matter will be brought forth to the Board of Directors of Opportunities New Brunswick for their consideration.</i></p>	<p><i>July 1, 2015</i></p>

Exhibit 2.3 - Summary of Recommendations (continued)

Recommendations	Department's Response	Target Date for Implementation
Objective 2: to identify all provincial government organizations that provide financial assistance to industry and determine whether they coordinate their assistance to limit the exposure of the Province. (continued)		
<p>2.96 We recommend the Department implement a process whereby financial assistance to industry provided by all government departments/agencies is monitored to determine the extent of financial assistance granted by all agents in the government reporting entity.</p>	<p><i>We currently do a formal review of this information in cases where a MEC is prepared. In other cases, Department staff normally communicate with other Departments and Agencies with respect to their intended and existing assistance/financing. We will seek to adopt a more formal process in the future.</i></p>	<p><i>June 1, 2015</i></p>
<p>2.97 We recommend, as an efficiency measure and to streamline administration, the Department of Economic Development make recommendations to Cabinet to rationalize the number of provincial entities that provide financial assistance to industry.</p>	<p><i>We will refer this recommendation to Jobs Board.</i></p>	<p><i>October 1, 2015</i></p>

Exhibit 2.3 - Summary of Recommendations (continued)

Recommendations	Department's Response	Target Date for Implementation
Objective 2: to identify all provincial government organizations that provide financial assistance to industry and determine whether they coordinate their assistance to limit the exposure of the Province. (continued)		
<p>2.98 We recommend the Executive Council Office take responsibility for coordinating the implementation by all departments/agencies providing financial assistance to industry of recommendations of this report.</p>	<p><i>The Executive Council Office acknowledges that there are a number of organizations within the Government of New Brunswick that provide financial assistance to industry, and that government structure, financial assistance programming and the assignment of roles and responsibilities are subject to change over time. As such, the Executive Council Office agrees that it should maintain responsibility for overseeing and coordinating the activities of the various government departments and agencies as it relates to implementation of the recommendations of this report, within the legislative, policy and budgetary framework of government.</i></p>	<p><i>To be determined by Executive Council Office.</i></p>

Exhibit 2.3 - Summary of Recommendations (continued)

Recommendations	Department's Response	Target Date for Implementation
Objective 4: to determine whether the Department publicly reports on the performance of the financial assistance it provides.		
<p>2.113 We recommend the Department report both expected and actual results of job creation and job maintenance in their annual report.</p>	<p><i>The Jobs Board has as part of its mandate, the establishment of overarching job creation and other targets for GNB. It is our understanding that these targets and results will be made public both routinely and annually. ONB would be one of the various agencies expected to substantiate and contribute to this results tracking. Further, it is expected that the Deputy-level members of Government's More Jobs Theme Team will collaboratively track performance in relation to priority GNB initiatives including job creation. Content from both of these reporting avenues are likely to be captured in the ONB annual report.</i></p>	<p>October 1, 2015</p>

Exhibit 2.3 - Summary of Recommendations (continued)

Recommendations	Department's Response	Target Date for Implementation
Objective 4: to determine whether the Department publicly reports on the performance of the financial assistance it provides. (continued)		
<p>2.123 We recommend the Department annually track and report the 10-year history of actual performance of assistance provided to industry, based on the 2010 analysis performed by the Office of the Comptroller.</p>	<p><i>Given the transition to a new Crown Corporation, which has implications for the 2010 analysis, ONB officials would be pleased to follow up on this recommendation with the Office of the AG. It will be important to understand the nuance difference between assistance provided to existing clients as well as that supporting foreign direct investment, as well as to delineate between financial and other forms of assistance to be provided under ONB's mandate.</i></p>	<p><i>October 1, 2015</i></p>
<p>2.127 We recommend the Department establish goals, objectives and measurable targets for its financial assistance to industry programs.</p>	<p><i>The form any programs will take and the associated objectives of each is under development as part of the transition to the new Corporation. As referenced in 2.113, there will be a number of channels through which goals and targets are established in the delivery of services by ONB.</i></p>	<p><i>October 1, 2015</i></p>

Audit scope**2.25** Our audit work included:

- interviewing current and past employees of the Department;
- examining annual reports, loan files and legal agreements;
- reviewing documents from the Conflict of Interest Commissioner's inquiry, including pertinent Memorandums to the Executive Council regarding Atcon's requests for financial assistance; and
- testing loan guarantees requested in 2008 and 2009 (we limited our examination to the accounts of the Atcon group of companies.)

2.26 Our audit was performed in accordance with standards for assurance engagements, encompassing value-for-money and compliance, established by the Chartered Professional Accountants of Canada, and accordingly included such tests and other procedures as we considered necessary in the circumstances.

2.27 Certain financial and statistical information presented in this chapter was compiled from information provided by others. It has not been audited or otherwise verified. Readers are cautioned that this financial and statistical information may not be appropriate for their purposes.

Objective 1: Due Diligence

2.28 When the Department of Economic Development provides financial assistance to industry, there is risk. Most companies that come to the Department for assistance are inherently risky because they typically cannot access financing from traditional sources such as banks or other financial institutions. The Department cannot eliminate this risk entirely, but can decide the level of acceptable risk based on the results expected and can take steps to mitigate this risk.

2.29 The purpose of due diligence is to contribute to informed decision making by considering all costs, benefits and risks of the decision at hand. This ensures a balance between the potential benefits to the Province and the associated risks.

2.30 Our first objective was:

to determine whether the Government exercised due diligence in granting financial assistance to the Atcon group of companies.

Since the early 1990's \$77 million in financial assistance has been granted to the Atcon group of companies

2.31 Since the early 1990's, the Department of Economic Development provided the Atcon group of companies a total of \$77 million in financial assistance, consisting of loans, guaranteed loans, forgivable loans and grants. Although the Legislative Assembly asked that we examine all financial assistance provided to the Atcon group of companies and Robert Tozer, we limited our detailed examination to two requests (loan guarantees for \$13.4 million and \$50 million) made in 2008 and 2009 for the following reasons:

- These two requests are the most recent;
- These two requests are the most significant in amount; and
- These two requests led to significant losses for the Province.

We were surprised to note significant financial assistance given to Atcon prior to the \$63.4 million of financial assistance granted in 2008 and 2009

2.32 Exhibit 2.4 shows the history of financial assistance (frequency and amounts) provided to the Atcon group of companies since 1993. We were surprised to note that prior to the \$63.4 million in assistance examined in detail in this report, \$13.9 million in grants, loans and loan guarantees was granted to the Atcon group of companies by the Department.

Exhibit 2.4 - Financial assistance granted to the Atcon group of companies by the Department of Economic Development between 1993 and 2009

Enterprise Name	Year	Type of Assistance	Amount (\$)	Outstanding Balance (\$) as at April 2014
Atcon Plywood Inc.	1993-1994	Loan	250,000	
Atcon Plywood Inc.	1993-1994	Forgivable Loan	750,000	
Atcon Plywood Inc.	1993-1994	Grant	1,608	
Atcon Plywood Inc.	1995-1996	Grant	2,605	
Eastwood	1996-1997	Loan	435,070	226,291
Atcon Plywood Inc.	1998-1999	Loan Guarantee	350,000	
Arvin Special Machinery	2000-2001	Forgivable Loan	347,695	
Atcon Plywood Inc.	2000-2001	Loan Guarantee	11,196	
Atcon Plywood Inc.	2001-2002	Grant	4,364	
Atcon Group	2002-2003	Grant	50,000	
Atcon Plywood Inc.	2002-2003	Grant	4,026	
Atcon Plywood Inc.	2003-2004	Loan Guarantee	643,780	683,642
Nutritec Inc.	2003-2004	Loan	100,000	
Atcon Plywood Inc.	2004-2005	Loan	4,000,000	1,342,682
Atcon Industrial	2007-2008	Loan	3,250,000	3,386,513
Atcon Industrial	2007-2008	Forgivable Loan	3,060,000	
Nutritec Inc.	2007-2008	Loan	650,000	663,770
Atcon Holdings Inc.	2008-2009	Loan Guarantee	13,362,845	13,604,697
Atcon Holdings Inc.	2008-2009	Loan Guarantee	20,000,000	20,000,000
Atcon Holdings Inc.	2008-2009	Loan Guarantee	20,000,000	20,000,000
Atcon Holdings Inc.	2008-2009	Loan Guarantee	10,000,000	9,651,248
Total			\$ 77,273,189	\$ 69,558,843

Source: Chart created by AGNB based on figures provided by the Department of Economic Development (unaudited)

2.33 In considering whether due diligence was performed, we examined documents supporting the decision to grant financial assistance to Atcon Holdings Inc. We considered whether:

- applications met the eligibility requirements of the corresponding program and legislation;
- applications were supported;
- assessment of the applications were based on standards and criteria;
- risks associated with the applications were assessed and mitigated; and
- rationale for the decision to grant assistance was evident and documented.

We noted unusual circumstances regarding Atcon's eligibility for the \$50 million loan guarantee

2.34 The *Economic Development Act* lists certain eligibility requirements for financial assistance to be granted. These include the requirement for an application, recommendation by the New Brunswick Industrial Development Board (NBIDB) and type of industry. The *Economic Development Act* states that the Minister shall not provide financial assistance unless an application has been received and referred to the NBIDB. Regulation 82-197 states an application must be in writing and set forth the financial assistance requested, the purpose for the financial assistance and the financial situation of the applicant.

2.35 We found a request was prepared and referred to the NBIDB, and the request included the information required by regulation, therefore meeting the minimal requirements with respect to the application. Regulation 82-197 to the Act specifically excludes certain industrial activities from receiving financial assistance from the Province. We found that Atcon's activities were not excluded by legislation. However, we did note some unusual circumstances surrounding Atcon's request for assistance. For example, the construction sector is eligible per legislation, though not normally supported by the Department. We also found there was never a formal written application for assistance prepared by Atcon. Rather, a request was prepared by departmental staff.

2.36 The requests met other eligibility requirements of the financial assistance to industry program, which include:

- requirement for location of operations in New Brunswick;
- previous unsuccessful attempts to receive financing from conventional sources;
- provision of adequate security; and
- eligible industry.

We found the lack of an application in writing by Atcon to be unusual

2.37 One area of weakness we found while reviewing the Atcon files was a lack of supporting documents in the file. As a result, it was sometimes difficult to determine what work had been performed, or the basis for certain decisions. We also found the lack of a formal application in writing by Atcon to be unusual.

Recommendations

2.38 We recommend the Department establish clear guidelines for applications for assistance with documented analysis maintained in the client file to ensure decisions are supported. This would allow subsequent review to be performed, as required.

2.39 We recommend the Department ensure all requests for assistance include an application properly prepared and signed as complete and accurate by the client.

No standards for approval of application

2.40 We expected to find standards or criteria against which applications would be assessed. We also expected approvals would require particular standards and criteria be met in order for an application to be approved (e.g. a minimum number of jobs created per assistance dollar). However, we found no standards or criteria must be met for the approval of an application. Standards and criteria would guide decision makers in assessing an application and provide a more objective basis for approval or rejection of an application.

Recommendation

2.41 We recommend the Department establish minimum standards and criteria, such as number of jobs to be created or maintained per dollar advanced, for use in evaluating applications for assistance.

Analysis based on outdated financial information

2.42 The assessment of Atcon's application for the \$50 million loan guarantee was not based on the most recent audited financial statements. We examined Memorandums to the Executive Council dated January 2009, March 2009 and April 2009:

- The financial analysis included audited financial statements for the 2006 and 2007 fiscal year end;
- Only internal, unaudited financial statements were available for 2008. Audited statements for the year ended January 31, 2008, which we would have expected to have been available for the analysis, were not; and
- Draft financial statements for the fiscal 2009 year end were received prior to the signing of the guarantee agreements in June 2009.

The Department has told us the issuance of the guarantee was conditional on the receipt of the audited financial statements. We were unable to obtain satisfactory evidence that the audited financial statements were received prior to the issuance of the guarantee.

2.43 The only Memorandum to Executive Council (MEC) to include a documented updated financial analysis including the audited financial statements for fiscal year ended January 31, 2009 was in August 2009 (requesting the release of security interest in favour of the Bank of Nova Scotia). The audited financial statements used in the assessment of the \$13.4 million guarantee were current. However, complete copies of financial statements were not included with the requests.

2.44 In our view all requests, especially those involving \$1 million or more, should require audited financial statements. Where not practical to include audited financial statements, such as a financial assistance request from a small business or a request under a specified threshold, the Department should establish a policy to determine when reviewed (rather than audited) financial statements would be acceptable.

Recommendation**Minister is not bound by recommendations of the NBIDB**

2.45 We recommend the Department include a complete version of the most recent audited financial statements with Memorandums to Executive Council requesting financial assistance.

2.46 When the Department receives a request for financial assistance, a project officer prepares an assessment of the application with a recommendation to approve or reject. A group of senior managers within the Department meet to review the submission and the project officer presents his or her recommendation.

2.47 If the request is greater than \$25,000, the submission is forwarded to the New Brunswick Industrial Development Board (NBIDB). At the time of our audit, the board was comprised of deputy ministers from the following departments:

- Economic Development;
- Agriculture, Aquaculture and Fisheries ;
- Natural Resources and Energy;
- Tourism and Parks;
- Post-Secondary Education, Training and Labour; and
- the President of the Regional Development Corporation.

2.48 The NBIDB reviews the submission and makes a recommendation to the Minister. If an application is not supported by the NBIDB and the Minister supports the rejection, the request goes no further. If the Minister does not support the rejection, the request moves on (as it did with Atcon's request). Cabinet approval is required when the sum of the following amounts is greater than \$500,000:

- financial assistance requested;
- financial assistance previously provided and not repaid; and
- financial assistance approved but not yet provided.

Cabinet approved \$50 million loan guarantee despite significant risks

2.49 The request for the \$50 million loan guarantee to Atcon presented numerous, significant risks to the Province that were documented in the analysis performed by departmental staff. The following are examples of the risks documented in the Department's assessment of Atcon's request for assistance:

- *“The requested \$10 million to complete the (...) 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 [Business New Brunswick] and without securing the required financing to fund the incremental work”;*
- *“Atcon's profitability in recent years has been marginal”;*
- *“Based on this past performance, the company's ability to repay any substantially increasing debt load is very questionable”;*
- *“Atcon has a dismal track record of meeting its payment obligations to BNB [Business New Brunswick]”; and*
- *“The company continues to embark on projects beyond its financial capabilities and then seeks provincial support after the fact”.*

2.50 The request for the \$50 million guarantee never received the approval of the NBIDB. Under the *Economic Development Act*, the Minister is not bound by the recommendations of the NBIDB. Despite the risks and rejections raised by staff and the NBIDB, the request was approved by Cabinet. The rationale for approval at the Cabinet level despite the numerous risks was not documented. At the time, several conditions were recommended by the Department, and approved by Cabinet, in order to mitigate some of the risks:

- personal and corporate guarantees;
- external review of assets;
- external advisory board;

- administrative changes;
- undertakings to sell or monetize contracts and assets.

Guarantee agreements were signed in June 2009.

2.51 Exhibit 2.5 provides additional information about the conditions put in place to mitigate the risk of the \$50 million guarantee.

Exhibit 2.5 – Description of conditions attached to \$50 million loan guarantee

Condition	Description
Personal guarantee	Personal guarantee from Robert Tozer. Guarantee does not apply to the personal residence.
Corporate guarantee	Corporate guarantee from Atcon Group (parent company of Atcon Holdings Inc.).
External advisory board	Atcon to arrange an external advisory board acceptable to the Minister, within 90 days, which shall include not less than one member appointed by the Minister, with the frequency of meetings to be held satisfactory to the Minister.
External review of company's assets	Atcon to arrange for an external review of the company's assets (including receivables, inventories, and other current assets) by a firm satisfactory to the Minister indicating results satisfactory to the Minister.
Administrative changes	Atcon to make such administrative changes as are necessary to ensure that any contracts in excess of \$5,000,000 are reviewed by the Advisory Board prior to acceptance, and the vice-president of Finance recommends acceptance of the contract based on anticipated profit margin and availability of the working capital required to undertake the contract.
Undertaking to see or otherwise monetize contracts and assets	Undertaking to sell or otherwise monetize the highway maintenance contract not later than September 30, 2009 with all proceeds being applied to the Minister's guaranteed loans. Undertaking to sell or otherwise monetize the Swedish assets as quickly as possible, but not later than July 31, 2010 with all proceeds being applied to the Minister's guaranteed loans. The company shall not reject any offer of \$18 million or more.

Source: Chart created by AGNB based on information included in the letters of offer for the \$50 million loan guarantee provided by the Minister of Business New Brunswick to Atcon.

2.52 Exhibit 2.6 displays a timeline of the requests, rejections, approvals and payouts surrounding the \$50 million guarantee.

Exhibit 2.6 - Timeline of rejections, approvals and payout between January 2009 and the March 2010 Atcon application for the \$50 million loan guarantee

Date	Event	BNB* Staff	NB Industrial Development Board	Cabinet
13-Jan-09	Initial assessment of request by Atcon	Rejected	N/A	N/A
19-Jan-09	Application reviewed by senior management at BNB	Rejected	N/A	N/A
19-Jan-09	Application reviewed by NBIDB	Rejected	No decision	N/A
09-Feb-09	Application reviewed by NBIDB	Deferred	Deferred	N/A
16-Mar-09	Application reviewed by NBIDB	Rejected	Rejected	N/A
25-Mar-09	Application reviewed by Board of Management**: conditions are added that require personal and corporate guarantees, external review of assets, administrative changes, undertakings to sell/monetize assets, restructuring plan	N/A	Rejected	Approved
23-Apr-09	Application to amend the initial approval from a portion of a revolving operating loan to a term loan for a four year period, reviewed by Board of Management	Approved	N/A	Approved
04-Jun-09	Amendment to conditions of approval to include restrictions on Atcon from competing with NB construction companies on government contracts	Approved	N/A	Approved
30-Jun-09	Loan guarantee agreements are signed between PNB, Atcon and the Bank of Nova Scotia	N/A	N/A	N/A
04-Aug-09	Internal departmental memo on status of Atcon: Company is experiencing cash flow problems	N/A	N/A	N/A
13-Aug-09	Request: - take \$2 million for working capital from money intended for capital projects: and - Province to release 1st security interest on Atcon assets.	Rejected Rejected	Rejected Rejected	Approved Rejected
02-Sep-09	BNB and Board of Management reject a restructuring request to release security held by BNB in favour of the Bank of Nova Scotia	Rejected	Note 1	Rejected
11-Sep-09	Cabinet reversed its September 2 decision. Security held by BNB is released in favour of the Bank of Nova Scotia.	Rejected	Note 1	Approved
23-Nov-09	Internal departmental memo indicates Atcon is experiencing severe cash flow problems and "running out of cash".	N/A	N/A	N/A
05-Mar-10	Bank of Nova Scotia demands payment from the Province for \$50 million in guaranteed amounts	N/A	N/A	N/A

* At the time of the agreements with Atcon, the Department of Economic Development was known as Business New Brunswick (BNB)

** Board of Management is a sub-committee of Cabinet. All decisions of Board of Management are ratified by Cabinet.

Note 1: This request was not reviewed by NBIDB as the Board had rejected the previous two requests.

Source: chart prepared by AGNB based on documents examined in files at the Department of Economic Development.

Cabinet approved release of 1st security position in favour of the bank, despite risks identified by staff

2.53 A month after the guarantee agreements were signed, the company was again experiencing serious financial difficulties and required working capital. The company asked the Department to allow them to use \$2 million intended for capital expenditures (as part of their loan guarantee) for working capital⁵, and to release its 1st security interest position in favour of the Bank of Nova Scotia in exchange for additional credit from the Bank. The request presented numerous risks and was rejected by departmental staff and the NBIDB. The NBIDB stated the Minister should not consider this request “*due to the extraordinary risk associated with this application.*” Once again, the request was eventually approved by Cabinet.

2.54 The following comments, demonstrating the significant risk tied to the request, were included in the Memorandums to Executive Council, and accompanying documents, leading up to the approval by Cabinet to release the security interest held by the Province:

- “*Company is in a dire financial position*”;
- “*The Company is on the verge of collapse*”;
- and
- “*Every step taken by the Province further erodes our security position, from bad to worse*”.

2.55 No rationale was documented or was evident for the decision to approve the request to release 1st security interest, despite the risks identified by staff. We do not understand why Cabinet approved this request as it appeared to have transferred the impact of the pending loss from the bank to the taxpayer.

⁵ Working capital refers to capital (or cash) that a business has on hand to use for its day-to-day operations.

2.56 When a high risk request receives approval, the submission to approve should also include recording the likely impact on the Province's financial condition, such as the creation of an allowance for doubtful accounts. In the case of Atcon's request for a \$50 million guarantee, it was not clear in the memorandum to Cabinet that an immediate provision for loss was required. In order to reflect the immediate impact of this decision on the accounts of the Province, a \$50 million provision for loss should have been noted in the Memorandum to Executive Council.

Recommendation

2.57 We recommend the financial considerations included in the Memorandum to Executive Council clearly state the financial impact on the accounts of the Province, including the need for a provision for loss.

Imbalance between risk and reward

2.58 We found risk was assessed at key points during the evaluation of the \$13.4 million and \$50 million guarantees. The Department does not have documented guidelines for the assessment of risk, but we found there were areas consistently assessed in both guarantees in order to determine risk, and the risk assessment performed was thorough. The risks and rewards to the Province were identified in the documents presented internally at the Department as well as those presented to Cabinet. There was, however, an imbalance in risk versus reward. It was clear the Province took on more risk than the potential reward from assisting Atcon.

If the condition on the \$13.4 million guarantee limiting future assistance had not been removed, provincial exposure would have been significantly lower

2.59 In the case of the \$13.4 million guarantee, the risk was significant enough that a condition, recommended by Department staff as well as the New Brunswick Industrial Development Board, was included to prohibit Atcon from requesting further provincial financial assistance until the guarantee expired or was released. This condition was subsequently removed at the company's request, supported by staff and approved by Cabinet. Although the rationale for removing the condition was not clear, we did find supporting documents where senior officials noted *"allowing the Atcon group of companies to apply for financial assistance while the guarantee is outstanding does not indicate a commitment on the part of the province. Any such request would be considered based on its merits."* It is possible that had the condition limiting future assistance remained, the loss resulting from the demise of Atcon would have been significantly lower as total provincial exposure at that time was \$16.4 million, compared to the \$72 million exposure a year later when the company failed.

Significant emphasis placed on vague job benefits

2.60 We also found inconsistencies in the description of the reward. On one document, the reward was described as *"could result in the creation of new construction jobs for New Brunswick"* while in another document it stated *"project (...) resulting in significant employment of NB residents."* This demonstrates the significant emphasis placed on vague job benefits in comparison to the significant risks for this file. In the case of the \$50 million guarantee, the risks were equally significant. The reward was described as *"hopefully result in the maintenance of the company's \$70 million payroll."*

Recommendation

2.61 To improve future economic development decision making, we recommend the Department quantify the risks and rewards to the Province in order to clearly establish and balance the value received for the output of funding and the risk assumed by the Province.

Claims made by Atcon were not all subject to validation

2.62 In the \$50 million Atcon application for financial assistance, the company made many claims. Some of these claims, included in a Memorandum to Executive Council, were marked “unverified”, such as:

- “The company claims that it is also securing substantial contracts for work on existing oil sands projects (as yet unconfirmed by BNB)”;
- and
- “The company claims that \$175 million, or 63% of forecasted sales for the coming year are committed. This claim has not been verified by BNB.”

We could not determine why these claims were marked unverified; however, Cabinet approved the request for financial assistance with the knowledge these claims were unverified.

2.63 There is no policy or guideline for Department staff as to which claims to verify. This is determined by professional judgment.

Recommendations

2.64 We recommend the Department establish guidelines for verification of claims and assumptions underlying projections included in applications for financial assistance.

2.65 We recommend all claims of job creation or maintenance, in connection with the application, be made in writing supported by documentation and signed by a company representative indicating the accuracy of the documentation and the company’s commitment.

Legislative authority to amend security was unclear

2.66 In October 2009, with the approval of Cabinet, the Minister amended the security on the Atcon \$50 million loan guarantee. An agreement was signed giving priority to the Bank of Nova Scotia's security over the Minister's security relating to pledged Atcon assets on the \$50 million guarantee. In exchange, the Bank provided Atcon with an additional credit facility of up to \$9.4 million for working capital.

2.67 Section 4 of Regulation 82-197 to the *Economic Development Act* states:

The Minister, where

- (a) *in the opinion of the Minister, an amendment or adjustment is deemed essential for the continued and orderly operation of an industry,*
- (b) *an adjustment or amendment does not extend the termination date of a loan, a guarantee of a loan or a guarantee of a bond issue, and*
- (c) *the security held by the Minister is not substantially affected by an amendment,*
may extend, defer, adjust or compromise the time for repayment of financial assistance provided or the terms and conditions of financial assistance provided to a person.

2.68 From our examination, there was a known substantial negative effect as a result of amending the security interest. This is demonstrated in the following comments from supporting documents, prepared by staff, for the request to amend security:

- “Every step taken by the Province further erodes our security position, from bad to worse.”;
- “Releasing the security as requested **could result in a large loss to the province** in the event of failure of Atcon. **It eliminates Atcon’s ability to pay off the provincially guaranteed loans** with the proceeds of the sale of the Swedish mill and the Highway Maintenance contracts, as a portion of those proceeds may go to the bank as a result of the Security Agreement.”;
- “Agreeing to the request **will weaken the**

Province's security position by \$33 million in the near term, and will provide the bank full security for its operating loan.";

- *"The Province would incur a loss, potentially in the \$50-\$71 million range, if the Company were to fail in the next 6 months."*; and
- *"Releasing that amount of security would cover not only the anticipated new \$10 million in Bank advances, but also a portion of the bank's existing security shortfall, at the Province's expense."*

2.69 The approval by Cabinet to amend the Province's security position was a critical decision affecting the magnitude⁶ of loss incurred by the Province upon the failure of Atcon. Because there was a substantial effect on security, in our opinion this decision did not comply with Regulation 82-197, Section 4(c). It should be noted that our view is based on consultations with legal experts.

2.70 However, the Executive Council Office has indicated they disagree with our interpretation of the Regulation. They are of the view the Minister had statutory authority to amend the security, without any further approvals. Perhaps this was the intent of the legislation but it should be noted such a view gives broad, unlimited latitude with the Minister. Effectively their position is that the Minister has sole discretion to amend security terms as he/she feels appropriate.

2.71 Given the diverse interpretation, it is evident there is need to revisit the Act and Regulation. This is particularly important to ensure future application of the legislative regime is clear. The events surrounding the Atcon file have given rise to an opportunity to address any ambiguity.

⁶ As demonstrated in the comments in paragraph 2.68: *"Agreeing to the request will weaken the Province's security position by \$33 million in the near term, and will provide the bank full security for its operating loan."*

Recommendation

Based on our review of the facts, it is our opinion Cabinet exercised a very troubling disregard for taxpayers' money

2.72 We recommend the Department, in collaboration with others, propose an update to the *Economic Development Act and Regulation* to clarify the authority to amend security.

2.73 Despite the company's poor history with the department, and repeated risks raised by senior officials, Cabinet approved \$50 million in financial assistance to Atcon Holdings. A number of terms and conditions, intended to mitigate the province's risk were put in place, only to be later removed by Cabinet. The documentation indicates Cabinet approved an amendment to the security position held by the Province, with full knowledge the amendment weakened the Province's security position by millions of dollars. Based on our review of these facts, it is our opinion Cabinet exercised a very troubling disregard for taxpayers' money.

2.74 Exhibit 2.7 provides a timeline of the changes to security with the \$50 million guarantee.

Exhibit 2.7 – Timeline of the changes to the security provided in respect of the \$50 million Atcon guarantee

	\$20M guarantee to replace subordinated debt	\$20M guarantee for term loan <i>** Only changes are highlighted **</i>	\$10M guarantee for capital expenditures
January 2009	Preliminary stage/security was not considered at this point	Preliminary stage/security was not considered at this point	Preliminary stage/security was not considered at this point
March 2009	If demand for payment is made by the bank, Minister shall make payment to the bank and the bank will assign its security to the Minister: - 1st charge Atcon's Swedish assets and interest in Brun-Way highway maintenance contract; - Corporate guarantee from Atcon Group; and - Personal guarantee from Robert Tozer, excluding personal residence.	If demand payment is made by the bank, proceeds of realization will be applied 1st against costs and expenses; 2nd against unguaranteed portion of loan; 3rd against guarantee portion of loan: - 1st charge on Atcon Holdings inventory and accounts receivable; - Assignment of accounts receivable insurance proceeds; - Corporate guarantee from Atcon Group; and - Personal guarantee from Robert Tozer, excluding personal residence.	If demand for payment is made by the bank, Minister shall make payment to the bank and the bank will assign its security to the Minister: - Charge over all assets and undertakings of Atcon Industrial Services Inc.; - Corporate guarantee from Atcon Group; and - Personal guarantee from Robert Tozer, excluding personal residence.
April 2009	No change to security	- Added: Charge on all other assets and undertakings of Atcon Holdings	No change to security
June 2009	Loan guarantee agreement is signed - no changes made to security	Loan guarantee agreement is signed - no changes made to security	Loan guarantee agreement is signed - no changes made to security
August 2009	Request by Atcon to release 1st security interest in Brun-Way highway operations in favour of the bank: REJECTED by Cabinet and NBIDB Note: <i>in supporting documents, the Department noted personal guarantees from all members of Mr. Tozer's immediate family should be obtained, including removing the current limitation on his personal residence, if this request is approved.</i>	No change to security	No change to security
September 2009 *	Cabinet approves release of security (Brun-way highway maintenance contract and Swedish plywood mill) in favour of the bank: - Bank would rank in 1st position for bank advances >\$28.5 million - Share security with the Province on 50/50 basis for operating loan amounts between \$10 million and \$28.5 million - Release all security to the Province once the bank loan is reduced by \$10 million	No change to security	No change to security
October 2009	Legal agreement is signed to amend the security priority	No change to security	No change to security

Source: chart prepared by AGNB based on information examined in files at the Department of Economic Development.

*In exchange for the security amendment, the Bank provided additional credit (up to \$9.4 million) to Atcon Holdings for working capital.

Minimal recovery against security

2.75 The Province initially requested a number of conditions to mitigate the risks posed by the requests for financial assistance by Atcon. Conditions included a corporate guarantee from the Atcon group; a personal guarantee from Mr. Tozer, excluding his personal residence; an external review of assets; and undertakings to sell or monetize assets and contracts.

2.76 As shown in Exhibit 2.7, the Department noted additional security be obtained to protect the Province, including personal guarantees from all members of Mr. Tozer's immediate family, and the removal of the limitation on his personal residence. Cabinet did not act on this suggestion. Following Atcon's bankruptcy in April 2010, the Province was left with close to \$70 million in unrecovered funds from the company.

2.77 At the time of our audit, the Province had recovered less than 1% (approx. \$400,000) of the amount outstanding through the receivership process; proceeds from some assets had yet to be distributed and could result in additional recoveries in the future. Recovery efforts are carried out by a court-appointed receiver. We could not determine with assurance, and the Department was unable to tell us, the loss to the Province as a direct result of the change in security interest. Based on the amounts recovered so far, the steps taken to mitigate risks were ineffective. In agreeing to release its security interest in favour of the bank, the Province further undermined the steps taken to mitigate the risks it faced.

Recovery on personal guarantee delayed

2.78 Also at the time of our audit, the Province had not recovered any funds on Mr. Tozer's personal guarantee. We were informed the title of the personal guarantee belonged to the Bank of Nova Scotia. Communications have been ongoing whereby the Province is seeking to obtain assignment of the personal guarantee. Once the Province receives title of the security, it will be in a position to initiate the recovery process.

2.79 We did not find evidence in the Department's file to demonstrate how the assets given as security, be it for the personal guarantee by Robert Tozer or other assets, were assessed as adequate in value to safeguard taxpayers' money.

Professional conduct complaint unresolved

2.80 A professional conduct complaint was made by the Province to the New Brunswick Institute of Chartered Accountants (NBICA) in the Atcon matter. As at November 2014, we were advised of the following status:

"In September 2014 Chartered Professional Accountants of New Brunswick assumed responsibility for investigating complaints made to the New Brunswick Institute of Chartered Accountants by the Province of New Brunswick arising out of the Atcon Holdings Inc. January 31, 2009 financial statements and audit report thereon. CPA New Brunswick advises that the Complaints Committee is currently at the document / evidence gathering stage of its investigation."

Litigation against auditors unresolved

2.81 In June 2014, the Province of New Brunswick commenced legal proceedings against the auditors of Atcon Holdings. The Province claims that Grant Thornton was negligent and in breach of its duties to the Province in conducting their audit of Atcon and rendering an unqualified audit opinion with respect to the fiscal 2009 financial statements. Media reports indicate Grant Thornton is prepared to vigorously defend itself in court. As at November 2014, we were advised of the following status of the legal proceedings:

"The Province of New Brunswick commenced an action against Grant Thornton LLP, Grant Thornton International Ltd and Kent M. Ostridge, CA by filing a Notice of Action with Statement of Claim Attached in the Court of Queen's Bench of New Brunswick in Saint John on June 23, 2014. Statements of Defense were filed September 29, 2014 by all three Defendants. The next step is for the parties to prepare and exchange Affidavits of Documents before scheduling Examinations for Discovery. Complex matters such as this can take years to resolve."

Recommendations

2.82 Where it would improve the security taken by the Province on loan agreements, we recommend the Department seek an independent assessment of assets when assets are provided as security on loan or guarantee agreements, especially where the value is significant. Should further financial assistance be requested, the Department should reassess the value of these assets as this may affect the realizable value of the security.

2.83 When personal guarantees are provided, we recommend the Province ensure there is adequate evidence to support the value of the personal assets such that there is sufficient net worth to safeguard taxpayers' money.

No “do not lend” list at the Department

2.84 We wanted to know if a company that previously defaulted on its guarantee agreements with the Province could later receive financial assistance from the Department. We found that there is no “do not lend” list at the Department. In our view, owners of companies involved in past defaults should be required to pay in full prior to obtaining further financial assistance.

Recommendation

2.85 We recommend the Department clearly identify companies and individuals involved in past defaults on government financial assistance as part of the Memorandum to Executive Council (MEC). Where there is a recommendation to approve assistance to such a company or individual, the justification should be clearly stated on the MEC.

**Objective 2:
Monitoring of Financial
Assistance****Six departments/agencies
provide financial assistance
to industry**

2.86 Our second objective is:

To identify all provincial government organizations that provide financial assistance to industry and determine whether they coordinate their assistance to limit the exposure of the Province.

2.87 We surveyed departments and agencies included in the provincial reporting entity to determine which provide financial assistance to industry and, specifically whether they had provided financial assistance to Robert Tozer or the Atcon group of companies. Financial assistance can include loans, loan guarantees, grants, forgivable loans, payroll rebates, tax incentives, and other forms of assistance.

2.88 At the time of our audit, we found that there were six departments/agencies that have programs to provide financial assistance to industry:

- Department of Economic Development;
- Department of Agriculture, Aquaculture and Fisheries (AAF);
- Department of Post-Secondary Education, Training and Labor;
- Regional Development Corporation;
- Provincial Holdings; and
- Invest NB.

2.89 The New Brunswick Innovation Foundation, a not-for-profit organization, also provides financial assistance to industry. It receives funding from the provincial government.

2.90 Given the number of agencies that provide financial assistance to industry, a more efficient and streamlined delivery of administration and services should be put in place.

No central monitoring of financial assistance to a single company

2.91 We were interested in determining whether there was any central monitoring of assistance to a single company because, in theory, a company could go to several departments/agencies and receive assistance. This would increase the total exposure of the Province if the company were to default. The departments and agencies we contacted were not aware of any central monitoring of the amount of financial assistance provided to a single company, industry or sector.

2.92 The total amount of financial assistance to the Atcon group of companies and Robert Tozer, as reported by the six departments/agencies, was almost \$81 million. The vast majority was provided by the Department of Economic Development. According to figures provided by the Department, it has provided \$77 million to Atcon (refer to Exhibit 2.4), of which close to \$70 million is in default.

2.93 The Department of Economic Development does not place a limit on the amount of assistance that can be provided to a single company or industry.

Our recommendations apply to all government departments/agencies that provide financial assistance to industry

2.94 The Legislative Assembly requested we make recommendations to improve the performance of the Department of Economic Development. However, given that at the time of our audit, there were at least six departments/agencies providing financial assistance to industry, we have recommended the Executive Council Office coordinate the implementation of our recommendations by all entities providing funding for economic development purposes.

Recommendations

2.95 We recommend the Department establish a limit on the amount of assistance/level of provincial exposure that can be granted to a single company or a group of related companies.

2.96 We recommend the Department implement a process whereby financial assistance to industry provided by all government departments/agencies is monitored to determine the extent of financial assistance granted by all agents in the government reporting entity.

2.97 We recommend, as an efficiency measure and to streamline administration, the Department of Economic Development make recommendations to Cabinet to rationalize the number of provincial entities that provide financial assistance to industry.

2.98 We recommend the Executive Council Office take responsibility for coordinating the implementation by all departments/agencies providing financial assistance to industry of recommendations of this report.

Objective 3: Implementation of Past Recommendations

2.99 Our third objective was:

To determine whether the Department has implemented recommendations made in previous performance audits of financial assistance to industry performed by our Office.

Past audits in the Department

2.100 We performed an audit in the Department in 1998 with the following objective:

To report whether financial assistance provided to business under the Economic Development Act is appropriately approved and monitored, and whether an appropriate effectiveness reporting system is in place and functioning.

2.101 We visited the Department again in 2010 to conduct an audit with the following objective:

To assess whether Business New Brunswick has adequate procedures in place to measure and report on the effectiveness of the financial assistance it provides to industry.

2.102 The purpose of these recommendations was to improve the procedures and overall performance of the Department.

2.103 We requested an update from the Department on the status of the 29 recommendations we made in 1998 and the 7 recommendations we made in 2010.

Only 61% of past recommendations have been implemented

2.104 Overall, we found that the Department has implemented 61% of the recommendations from the 1998 and 2010 performance audits. The implementation rate for the 2010 audit was only 29% and 69% for the 1998 audit. The implementation rate on the 2010 audit is low because the Department disagreed with 3 of our 7 recommendations. The Department also disagreed with one of our 29 recommendations from the 1998 audit. The recommendations the Department disagreed with addressed the need for policies and procedures to verify client information, analysis to assess the reasonableness of client assertions, types of financial analysis to be performed to identify risk, and the need for monitoring. A listing of the recommendations that were not implemented, including recommendations the Department disagreed with, can be found in Appendix III.

Areas of weakness persist

2.105 Because not all recommendations were implemented, we believe some areas of weakness persist:

- The requirement to verify client claims and assertions (other than audited financial statements), as well as documenting the work performed, is at the discretion of the loan officer;
- There are no benchmark acceptance levels for evaluating applications. If an approval is granted despite certain factors, the rationale is not documented; and
- There is poor performance reporting in the annual report on the success of the financial assistance to industry programs.

2.106 These areas of weakness were again noted during our examination of the Atcon files and similar recommendations are once again made in this report. We were disappointed more recommendations had not been implemented.

**Objective 4:
Performance Reporting**

2.107 The provincial government provides financial assistance to industry using public resources. Because they use public resources, we expect government to be responsible and accountable for how they manage these resources⁷.

2.108 Our fourth objective was:

To determine whether the Department publicly reports on the performance of the financial assistance it provides.

2.109 In assessing this objective, we considered whether the Department:

- has established goals and objectives for its financial assistance programs;
- measures the performance of these programs; and
- publicly reports on the performance of the financial assistance provided.

2.110 We reviewed the two most recent annual reports (2011-12 and 2012-13) available on the Department's website and also examined reporting by similar agencies within the provincial reporting entity.

**Department does not
report actual performance
results**

2.111 Based on our review, we found the Department does not report sufficient information in its annual report to assess the performance of financial assistance to industry programs.

⁷ *A Framework for Identifying Risk in Grant and Contribution Programs*, Office of the Auditor General of Canada, November 2000

Impossible to assess impact of financial assistance provided

2.112 In the Performance Management section of the 2012-13 annual report, the Department reports on the amount of financial assistance approved under the various financial assistance programs. It also presents the projected number of jobs committed and maintained. However, actual jobs created and maintained are not reported. When only forecasted job results are presented, it is impossible to assess the true economic impact of the financial assistance provided by the Department.

Recommendation

2.113 We recommend the Department report both expected and actual results of job creation and job maintenance in their annual report.

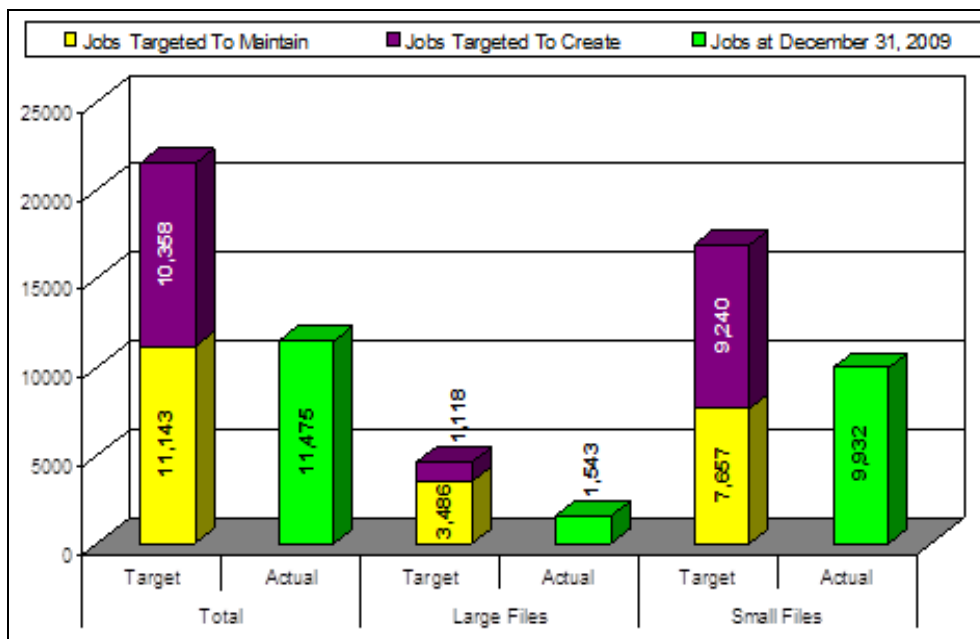
Past review by the Office of the Comptroller revealed poor value for money

2.114 In September 2010, the Office of the Comptroller prepared a quantitative analysis of financial assistance to industry from 2001 to 2009. It examined financial assistance provided to industry by the Department of Economic Development between 2001 and 2009. Though the analysis is several years old, it is the only analysis we found that assessed the actual performance of the Department's loans, loan guarantees and strategic assistance. The findings are those of the Office of the Comptroller and were not audited or otherwise verified by our Office. We present this information as we believe the Department should report similar information in its annual report, to provide more meaningful and transparent reporting.

2.115 The results presented by the Office of the Comptroller raised concerns about the value for money of the \$700.1 million in financial assistance issued by the Department during the period between 2001 and 2009. Funds were disbursed for either job creation or maintenance, or a combination thereof. Department staff have noted the timeframe under review included, in part, a period of economic crisis beginning in 2007 when many of their accounts were negatively affected by the economic slowdown in the US.

2.116 The Office of the Comptroller noted in their review that \$294 million in assistance had been issued to 130 companies whose files were considered “complete” at the time of their review. They categorized the files as either *Large* or *Small*. *Large* files are companies that received \$5 million or more; *Small* files received less than \$5 million. Exhibit 2.8 presents the target and actual job results by file size.

Exhibit 2.8 - Target and actual job results from completed files



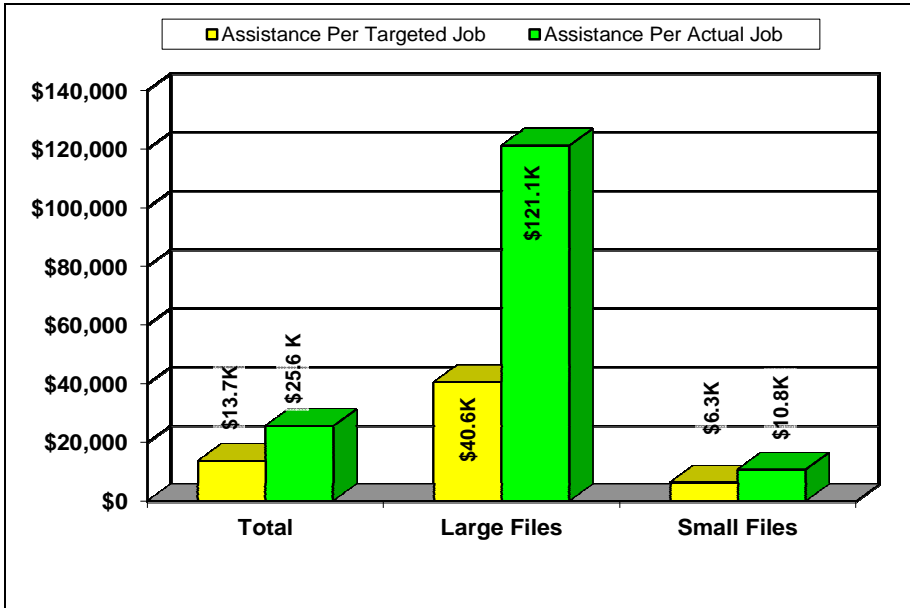
Source: Financial Assistance to Industry: 2001 to 2009, Office of the Comptroller, September 2010

Of nearly \$300 million in assistance, only 53% of the targeted jobs were created

2.117 Exhibit 2.8 shows that given almost \$300 million in assistance, only 53% (11,475 of 21,501) of the targeted jobs were created. The *Large* files count 13 companies who received \$186.9 million (64%) while the *Small* files include 117 companies who received \$107 million (36%). It also shows that the rate of success for *Large* files was 33.5% while the *Small* files achieved 58.8% of their targeted job results. The financial assistance provided to Atcon is included in the *Large* files.

2.118 The review also describes the high cost of job creation for those files considered complete. Exhibit 2.9 shows the amount of financial assistance paid per job for completed files.

Exhibit 2.9 - Assistance per targeted and actual cost per job on completed files



Source: Financial Assistance to Industry: 2001 to 2009, Office of the Comptroller, September 2010

Actual cost per job was much higher than expected⁸

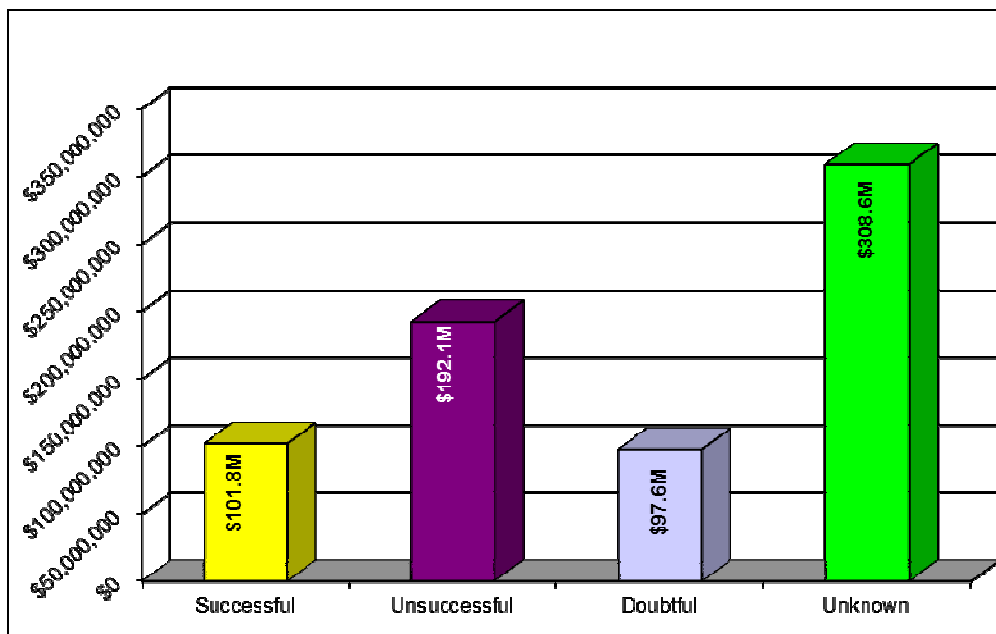
2.119 Exhibit 2.9 displays an overall cost of \$25,600 per actual job created and maintained, 86% higher than the expected cost of \$13,700. The Office of the Comptroller also found the actual cost per job created for *Large* files to be \$121,100, three times higher than the expected cost \$40,600.

⁸ Expected outcomes are based on figures from targeted jobs, as shown in Exhibit 2.9

Only 15% of assistance granted between 2001 and 2009 was deemed successful

2.120 The Office of the Comptroller also reported that of the \$700.1 million of financial assistance provided⁹ between 2001 and 2009, a total of \$289.7 million of assistance (41%) was categorized as unsuccessful or doubtful, as shown in Exhibit 2.10. Only \$101.8 million (15%) of assistance granted was deemed successful; success was described as completing the financing terms and meeting the jobs target approved by Cabinet. The remaining balance of assistance provided, valued at \$308.6 million (44%) and classified as unknown. It was not in default and the term had not yet expired.

Exhibit 2.10 - Results of assistance granted between 2001 and 2009



Source: Financial Assistance to Industry: 2001 to 2009, Office of the Comptroller, September 2010

⁹ This assistance could include loans, loan guarantees, and strategic assistance. The figure of \$700 million does not equate to funds paid out; instead, it reflects funds at risk (items such as loan guarantees are only paid out if a company defaults on their loan).

2.121 The assessment by the Office of the Comptroller focused on actual results, unlike the results reported by the Department in their annual report. Our purpose in reporting the Office of the Comptroller's findings was to demonstrate the actual performance of financial assistance to industry can and should be tracked and reported by the Department.

2.122 In the review, the Office of the Comptroller questioned whether the Province was getting sufficient results or outcomes from the investment made. This further emphasizes the importance of accountability and transparency when it comes to the outcomes of the financial assistance to industry program in order to determine whether this is an effective use of taxpayers' money.

Recommendation

2.123 We recommend the Department annually track and report the 10-year history of actual performance of assistance provided to industry, based on the 2010 analysis performed by the Office of the Comptroller.

No goals or objectives for financial assistance programs

2.124 Goals and objectives are an important component of performance reporting because they set the result to be achieved by program, allowing for the measurement of performance at the end of each year. In the case where a result is not achieved, performance measurement allows the Department to review and improve its activities in order to meet the targeted result in the future.

Department needs to determine acceptable loss to measure performance

2.125 The results of the assessment performed by the Office of the Comptroller (discussed in previous section) appear concerning. However, it is difficult to assess performance when the Department has not set a target to be achieved. Given the high risk of many of its clients, it is not unreasonable to expect significant losses may occur. However, the Department should determine the acceptable amount of loss by establishing goals and objectives against which performance can be measured.

2.126 We found that no goals or objectives have been established specifically for financial assistance to industry programs.

Recommendation

2.127 We recommend the Department establish goals, objectives and measurable targets for its financial assistance to industry programs.

Example of good performance reporting at Invest NB

2.128 We examined the reporting by other departments/agencies that provide financial assistance to industry in order to find best practices of reporting.

2.129 At the time of our audit, Invest NB is an agency that provided financial assistance to attract business investment in New Brunswick. The reporting presented by Invest NB is an example of a best practice within government. Invest NB reported on its performance by using a number of key indicators, including the number of new investments, direct employment from investments, average salary for new jobs created and the return on taxpayer investment. Their 2012-13 annual report states that all performance measurements used by the corporation are based on actual results. They also reported on the amount of impaired loans.

2.130 This type of information would be useful and relevant to the Legislature in assessing the performance of the financial assistance programs of the Province.

2.131 The Department indicated that there are expanded internal reporting requirements in 2014-15, as part of the performance excellence process within government.

Appendix I - Motion 42, unanimously adopted by the Legislative Assembly on Wednesday June 12, 2013

Motion 42 by Hon. Mr. Williams, seconded by Hon. Mr. Flemming to propose the following resolution on Wednesday, April 17, 2013:

WHEREAS the former Liberal government granted seventy million dollars of financial assistance to the Atcon group of companies in 2008 and 2009;

WHEREAS immediately prior to approving fifty million dollars in assistance in March of 2009, Business New Brunswick had flagged that Atcon was showing signs of insolvency;

WHEREAS immediately prior to the former Liberal government approving fifty million dollars in assistance in March of 2009, Business New Brunswick had recommended that further assistance not be given to Atcon and assessed the risk as "high";

WHEREAS immediately prior to the former Liberal government approving fifty million dollars in assistance in March of 2009, New Brunswick Industrial Development Board, a body composed of senior civil servants, concurred with the recommendation against providing further financial assistance to the Atcon group of companies;

WHEREAS despite the clear signs that Atcon was in serious financial difficulty and against the recommendations of government officials, the then Minister of Business New Brunswick offered fifty million dollars in further assistance on March 27, 2009;

WHEREAS Atcon is now insolvent and out of business;

WHEREAS the vast majority of the funds advanced by the Government of New Brunswick have not been recovered and represent a loss to the taxpayers of New Brunswick;

WHEREAS the Conflict of Interest Commissioner has recommended that this House consider 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;

BE IT THEREFORE RESOLVED that this Assembly request the Auditor General of New Brunswick to conduct an audit of all the financial assistance given by the Province of New Brunswick to Robert Tozer and the Atcon group of companies, including recommendations on how to improve the performance of the Department of Economic Development, formerly known as Business New Brunswick.

BE IT FURTHER RESOLVED that this Assembly recommend that all the evidence and information in the Conflict of Interest Commissioner's inquiry into allegations by Mr. Claude Williams, MLA for Kent South of violations of the *Members' Conflict of Interest Act* with respect to the above matter, be preserved and made available to the Auditor General of New Brunswick to assist her in the audit and recommendations.

Objective 4

2.135 To determine whether the Department publicly reports on the performance of the financial assistance it provides.

Criteria

- The Department should have goals and objectives for the performance of its financial assistance to industry program.
- The Department should measure the performance of its financial assistance to industry program.
- The Department should publicly report on the performance of assistance it has provided to industry.

Appendix III - Summary of past recommendations that have not been implemented

2010 Report of the Auditor General, Volume 2, Chapter 2		
Department of Business New Brunswick: Financial Assistance to Industry		
Paragraph Number	Outstanding Recommendation	2014 Status
31	We recommended the Department establish additional measurable targets for Financial Assistance to Industry Program (FAIP) to allow it to evaluate FAIP from different perspectives.	Not implemented
53	We recommended the Department establish policies and procedures with respect to verifying clients' financial information other than their audited financial statements.	Disagreed
75	We recommended BNB establish policies and procedures regarding which types of financial analysis should be performed to identify risk of potential loss and which types of mitigation steps should be taken based on the risks identified.	Disagreed
94	We recommended the Department report to the Legislative Assembly on the success of FAIP in achieving the Department's targets.	Not implemented
105	We recommended BNB put in place a monitoring process that directly assesses each forgivable loan recipient's progress compared to the original payback calculation. This assessment should look at each of the three components of the original payback calculation: the risk factor, the estimated amount of incremental payroll and the income tax rate.	Disagreed

Appendix III - Summary of past recommendations that have not been implemented (continued)

1998 Report of the Auditor General, Chapter 5		
Department of Economic Development and Tourism: Financial Assistance to Business and Performance Reporting		
Paragraph Number	Outstanding Recommendation	2014 Status
42	The policy and procedures manual should define benchmark acceptance levels for each selection criterion, as well as guidelines or use in evaluating client information.	Not implemented
52	Each client file should document each of the selection criteria considered and show whether it meets the established benchmark. Information and analyses supporting the evaluation and a conclusion regarding each criterion and key analysis should be present.	Not implemented
53	In cases where approval of the application has been recommended even though one or more benchmarks have not been met, a rationale for the approval should be documented.	Not implemented
61	Client assertions should be subjected to sufficient analysis and review to determine, within reasonable limits, that plans are reasonable and achievable.	Disagreed
62	Requirements to verify client assertions should be documented in the policy and procedures manual.	Not implemented
63	Documentation showing the analysis and review performed by the Department in determining the validity of client assertions, along with client backup documents, should be placed in the client files.	Not implemented
118	The Department should develop more precise definitions for existing departmental performance indicators relating to jobs created and wealth generation.	Not implemented
122	The Department should show annual targets for all departmental performance indicators that are reported in the departmental annual report. Reporting against these annual targets should allow for a yearly evaluation of the Department's achievement in meeting strategic objectives. Such annual targets could be part of longer-term targets established in the Performance Measurement supplement to the Main Estimates for particular performance indicators.	Not implemented
129	Additionally, once departmental strategic objectives have been defined, it would be useful to have performance indicators and narrative descriptions of achievements presented by strategic objective in the annual report. This would make it much easier for a reader to evaluate the degree of success of the Department in achieving its strategic objectives.	Not implemented