

**COHEN COMMISSION OF INQUIRY INTO THE DECLINE OF
SCKEYE SALMON IN THE FRASER RIVER**

**STATUS REPORT
July 7, 2010**

1. INTRODUCTION

This is the Cohen Commission's second Status Report. It provides general information about the commission's main activities between April and June 2010. The Commission's first Status Report, covering the period November 2009 to March 2010, is available at:

<http://www.cohencommission.ca/en/pdf/CohenCommissionStatusReportJul7-2010.pdf>.

As contemplated in the Terms of Reference, the commission will publish an interim report and a final report:

- The interim report, due on or before August 1, 2010, will include the Commissioner's preliminary views on, and assessment of, any previous examinations, investigations or reports that the Commissioner considers relevant to the Inquiry, and the Government's responses to those examinations, investigations or reports. It will also describe the commission's contracted research program, the topics to be investigated during the commission's evidentiary hearings, and its proposed public forums and site visits.
- The final report, due on or before May 1, 2011, will include the Commissioner's independent findings of fact regarding the causes for the decline of Fraser River sockeye salmon, and the current state of and long term projections for these stocks. It will also include the Commissioner's recommendations for improving the future sustainability of the Fraser River sockeye salmon fishery.

2. RECENT ADMINISTRATIVE ACTIVITIES

Over the last three months, the commission has overseen a number of important administrative activities, including the following:

- To ensure compliance with the Government's security requirements, renovations were made to the commission's office space over seven weeks in April and May 2010.

- The Terms of Reference require the commission to make use of the same database management application (Ringtail Legal) as used by the Department of Justice. In order to make the best possible use of this technology, the commission decided to provide the participants with access to the Ringtail document database. This required the procurement of additional user licenses, online access protocols and training of participant staff.
- As noted below, the Government of Canada is the primary source for disclosure of documents. However, many participants will also be required, on request, to provide documents to the commission. To ensure consistency across the Ringtail database with the disclosure documents prepared by the Department of Justice, the commission prepared for participants guidelines for submitting disclosure documents. This consistency will assist all users in working with a powerful document management tool.
- The commission, having given the participants access to the Ringtail document disclosure database, intends having access to the application during the evidentiary hearings. A secure wireless system has been installed in the hearing room for the use of the commission and participant counsel. The wireless system will enable participants to access the database and, with the use of projectors and monitors, documents, exhibits and transcripts will be available immediately.

3. DECISIONS TO GRANT PARTICIPANT STANDING AND FUNDING

The commission's Rules on Standing and Funding allow persons, governments and organizations to apply for standing to participate in the inquiry's evidentiary hearings. Groups and individuals who have been granted standing are called participants.

a. Standing

On March 23 and 26, 2010, the Commissioner held hearings into 49 applications for standing to participate in the commission's activities. Commission counsel worked with those applicants whose interests overlapped, to canvas the option of participating jointly or in coalitions. Many applicants showed remarkable cooperation by agreeing to participate and collaborate through broader standing groups, which will improve the effectiveness and efficiency of the hearings.

In his April 15, 2010 Ruling on Standing, the Commissioner made 20 grants of standing (more than any previous federal commission of inquiry) to groups and individuals whom he concluded had substantial and direct interests in the subject matter of the inquiry. In many instances, the Standing Ruling accords a single grant of standing to be jointly shared among a number of participant groups.

On May 13 and May 31, 2010 the Commissioner released three further rulings that varied and clarified his Standing Ruling, specifically with respect to the Heiltsuk Tribal Council and the Douglas Treaty First Nations.

b. Funding

The commission's Terms of Reference authorize the Commissioner to recommend to the Clerk of the Privy Council that funding be provided in accordance with terms and conditions approved by the Treasury Board, to ensure appropriate participation of participants, if the Commissioner is of the view that participants would not otherwise be able to participate in the inquiry. The Treasury Board's terms and conditions limit funding to legal costs and disbursements and inter-city travel expenses incurred by counsel. Most participants submitted applications to the Commissioner for funding in accordance with these terms and conditions.

After considering the participants' evidence and their written and oral submissions, the Commissioner provided his funding recommendations to the Clerk of the Privy Council Office on May 12, 2010.

On June 9, 2010, the Privy Council Office advised the commission that the Government of Canada had granted funding as recommended by the Commissioner, to a maximum limit of \$3,423,200. The Commissioner notified all participants accordingly.

4. RULES FOR PROCEDURE AND PRACTICE

Under the authority of the *Inquiries Act* and the commission's Terms of Reference, the commission developed rules respecting the conduct of the inquiry and the procedures to be followed. In April 2010, the commission provided to participants its Draft Rules for Procedure

and Practice, and sought their input. Some participants took the opportunity to comment by proposing revisions to the Draft Rules, and seeking clarifications on the Draft Rules.

After considering this input and making some revisions, the Commissioner finalized the *Rules for Procedure and Practice*. The *Rules* were posted on the commission website on May 13, 2010.

5. INTERIM REPORT

Over the last three months, commission counsel have continued to assist the Commissioner in reviewing and summarizing previous examinations, investigations or reports; their recommendations; and DFO's responses to these recommendations.

Likewise, DFO Pacific Region officials helpfully assembled for the commission the recommendations made in 25 previous examinations, investigations or reports, that had been initiated by or prepared for the Government of Canada, along with DFO's responses to those recommendations. On May 17, 2010, DFO officials provided a 300-page summary, entitled *Recommendations Related to Fraser River Sockeye Salmon and Responses by the Government of Canada 1982-2010* (Recommendations and Responses Summary).

The Recommendations and Responses Summary lists DFO's formal, written responses to many recommendations, and states that these responses were "drawn from documents drafted at the time the recommendation was made." For some recommendations, DFO has further described what it says were its subsequent, follow-up actions, although it has made clear that additional explanation of these stated actions may be required during the evidentiary hearings. To date, one participant group has made written submissions regarding the sufficiency and merits of DFO's stated responses and actions, which will inform the commission's evidentiary hearings.

6. IDENTIFYING THE ISSUES THAT THE COMMISSION WILL INVESTIGATE

On June 3, 2010, the commission released a Discussion Paper entitled *Issues that the Commission Intends to Investigate*, which is posted on the commission's website.

The primary purpose of the Discussion Paper was to solicit the participants' views on the issues that the commission intends to examine. The commission considered it crucial to obtain the views of participants at the outset, on the matters that should be within the scope of its investigation and ultimately the subject of its evidentiary hearings. Participants were asked to identify any important issues that the commission had not yet identified that require examination, and to rank the relative importance of the issues.

In public hearings on June 15-16, 2010, the Commissioner heard the participants' oral submissions on the issues that the commission should investigate. Many participants also filed written submissions by June 30, 2010.

Over the last few weeks, the Commissioner, counsel and our fisheries research consultant have been carefully considering these submissions. The commission intends to incorporate into the evidentiary hearings many of the issues raised by participants. These issues encompass scientific and technical issues, fisheries management and conservation practices, and the intersection between management and science at DFO.

Many of the new issues raised by participants have also now been incorporated into the commission's proposed contracted research projects.

The commission has taken participants' views into account in identifying topics to be investigated through the evidentiary hearings. Within the next few days commission counsel will provide participants with a Proposed Evidentiary Hearings Plan listing the issues that the commission intends to consider (in as much detail as is possible at this stage), and setting out the sequence in which those issues will be examined.

Commission counsel will meet with counsel for the participants on July 19, to obtain their final input on the issues to be investigated during the evidentiary hearings, and on the related contracted research projects.

7. DOCUMENT PRODUCTION AND PREPARATION FOR HEARINGS

The commission is carrying out its investigations and is preparing for the evidentiary hearings through three main activities: reviewing documents produced by Canada, seeking and reviewing documents produced by participants, and interviewing prospective witnesses and others who have relevant information.

a. Reviewing documents produced by Canada

In November 2009 the commission requested, through the Department of Justice, that DFO produce all relevant documents in its possession. The Terms of Reference require that the commission store such document disclosure in Ringtail, the automated documents management program specified by the Attorney General of Canada.

Given the commission's broad mandate, disclosure and review of documents are massive endeavours. To date, DFO has produced approximately 47,000 core documents to the commission. The commission acknowledges, with appreciation, the exceptional resources that DFO and the Department of Justice have committed to this daunting task.

However, the documents produced to date constitute only a fraction of the total volume of documents that the Government anticipates reviewing and potentially producing. The total number of documents to be reviewed is estimated to be:

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| • DFO core documents (other than e-mails) | 95,000 |
| • DFO e-mails going back 5 years | 210,000 |
| • Documents from other government departments | 80,000 |

It should be noted that it was only in February 2010 that the commission learned that the Department of Justice had interpreted the commission's request for all relevant documents to exclude e-mails. The commission clarified in early March that DFO e-mails should be produced, and agreement was reached on the parameters for DFO's initial e-mail production.

In late April 2010, the Department of Justice advised the commission that the Government would complete its production of DFO core documents (other than e-mails) by mid-June 2010, but by late June the Department revised that completion date to August 1, 2010. The

Government further advised that it could not reasonably meet any deadline to produce all relevant documents prior to the start of evidentiary hearings, tentatively set for September 2010.

b. Seeking and reviewing documents produced by other participants

Under the commission's *Rules*, participants are required to identify relevant documents in their possession as soon as possible after being granted standing. Participants are not required to list each document, but simply to identify the categories and types of documents that they possess. This identification permits the commission to determine whether any of those documents would be of assistance to the commission and should therefore be produced.

In the spirit of cooperation and collaboration contemplated by the Terms of Reference, the commission has encouraged participants to identify proposed witnesses, such as DFO officials, experts or their own representatives, who participants would like to have testify. In the last few weeks, some participants have made helpful proposals for witnesses.

c. Conducting interviews of individuals with relevant information

Since late March, commission counsel have arranged and/or conducted dozens of interviews with persons who have relevant information to share with the commission, including DFO officials, representatives of participant groups, and independent experts. This interview process will continue throughout the Summer and up to commencement of the evidentiary hearings. Some of these interviews assist the commission in providing background information and guidance, while others lead to the identification of prospective witnesses in the evidentiary hearings.

After commission counsel have confirmed which witnesses will be called, the commission will provide to all participants the names of the witnesses and, in most cases, a summary of their anticipated evidence.

d. Commencement of evidentiary hearings

Although document production from DFO and from other participants will be ongoing, commission counsel is hopeful that, by the latter part of October, the commission will have received disclosure of enough documents to be able to commence the evidentiary hearings. On that basis, the Commissioner has agreed that the evidentiary hearings should begin on Monday, October 25, 2010.

8. THE COMMISSION'S AUTHORITY TO MAKE FINDINGS OF MISCONDUCT

A participant standing group has brought a motion before the Commissioner seeking a ruling that, under the *Inquiries Act* and the commission's Terms of Reference, the Commissioner lacks jurisdiction to make any findings of misconduct. Participants who support that interpretation have until July 7 to file written submissions. Participants who hold a different position must file their submissions by July 21, and reply submissions must be filed by July 23. The Commissioner will consider written submissions, and if necessary oral submissions, and intends to issue a ruling before the evidentiary hearings commence in October.

9. SCIENCE PROGRAM ACTIVITIES

a. Science Advisory Panel

The commission determined that it would benefit from input from experts on fisheries science, salmon biology and other technical and scientific fields. To that end, in April 2010 the Commission retained six prominent salmon fisheries and conservation experts to assist in identifying key scientific and technical issues requiring consideration.

To date, the panel's role has been to assist the commission's fisheries research consultant in formulating, and commenting on, the proposed research projects, and to identify qualified researchers that the commission might consider. The commission is currently considering appointing to the panel a recognized expert in Aboriginal traditional knowledge.

b. Contracted technical and scientific research reports

The commission has determined that the investigation of several issues identified in its June 2010 *Discussion Paper* would be facilitated by the completion of 12 contracted technical and scientific research reports. In developing the terms of reference for these projects, the commission's legal team and fisheries research consultant incorporated many suggestions received from participants in their written and oral submissions. Details of these projects, including the names and brief biographical sketches of the contractors, will be posted on the commission's website once the contracts are finalized.

In most cases, the contracted research projects contemplate that the researcher will provide the commission with a progress report by November 15, 2010, and the final report by January 31, 2011. Following receipt of the progress reports, the commission intends to convene a two-day workshop at which the contracted researchers will summarize their work to date, and engage in a challenging dialogue with each other and with the commission's Scientific Advisory Panel and the commission's fisheries research consultant. The workshop is intended to provide a peer review of the research projects while still in progress, and to consider the cumulative effects of possible causes for the decline of Fraser River sockeye. Following the workshop, counsel for all participants will receive the contractors' progress reports and a summary of the workshop proceedings.

Following receipt by the commission of the researchers' final reports, the commission will provide the reports to counsel for all participants. The researchers will summarize their findings and conclusions during the evidentiary hearings, at which counsel for participants will have an opportunity to question the researchers. In addition, the commission intends to contract with an external contractor to synthesize the information contained in the researchers' technical reports, to address cumulative impacts and to evaluate possible causes for the decline of Fraser River sockeye salmon.

10. PUBLIC FORUMS AND OTHER PUBLIC INPUT

The Commissioner is considering holding public forums in several coastal and Fraser River communities along the sockeye salmon migratory route. He may also visit sites that will provide him with context and information about various aspects of the fishery. More information on these events will be provided in the near future.

Members of the public may also express their views on the subject matter of the commission by making written submissions on the commission's website:

<http://www.cohencommission.ca/en/submissions/SubmissionForm.php>. These public submissions inform commission counsel's ongoing work, and may ultimately be considered and relied upon by the Commissioner.