

Chapter 1 • The Commission's mandate

■ Precipitating events

The sockeye salmon of British Columbia's Fraser River are iconic in Aboriginal and non-Aboriginal communities. They have sustained numerous Aboriginal communities and have been at the centre of Aboriginal traditions in this province for millennia. As well, Fraser River sockeye are an important resource in the province's economy, and a key component of its freshwater and marine ecosystems.

Thirty years ago, the Government of Canada established a wide-ranging inquiry to examine all Pacific coast fisheries, including Fraser River sockeye salmon.* Since then, the landscape has changed dramatically. Warming marine and river temperatures and changing snowpack-melting patterns have added to other stressors affecting the health and productivity

of Fraser River sockeye salmon. The Supreme Court of Canada and lower courts have made pronouncements on Aboriginal fishing entitlements under the Canadian Constitution, and on other aspects of fisheries management. Management of the Fraser River sockeye fishery has become more complex given competing claims by First Nations and stakeholders, changing policies and practices, and dozens of investigations and reports containing hundreds of recommendations.

Fisheries managers and fish biologists have identified a decline in Fraser River sockeye abundance and productivity since the early 1990s. In terms of abundance, Figure 1.1.1 illustrates that decline and places it in a broader historical context.

* The inquiry was called the Commission on Pacific Fisheries Policy. In 1982, Commissioner Peter H. Pearce produced *Turning the Tide: A New Policy for Canada's Pacific Fisheries, Final Report of the Commission*.

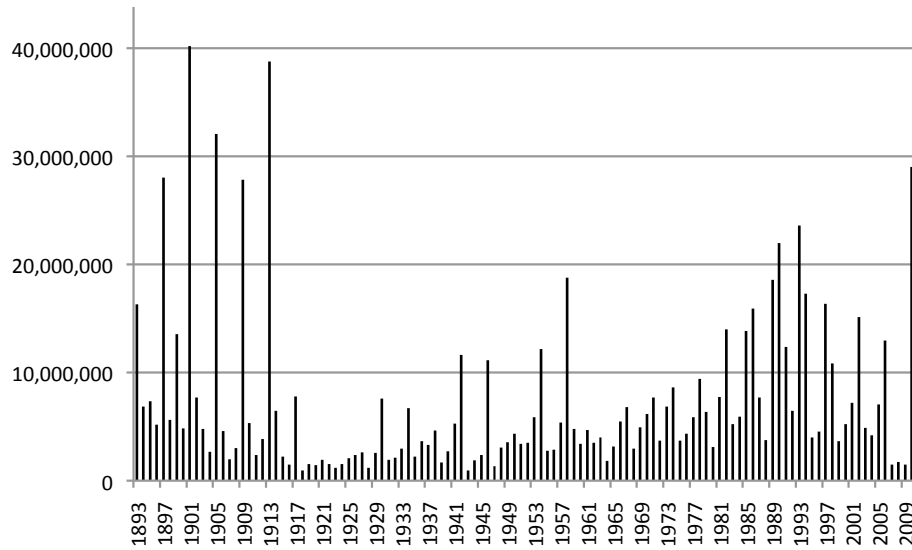


Figure 1.1.1 Total Fraser River sockeye returns, 1893–2011

Note: The Hell’s Gate rockslide in 1914 was a catastrophic event widely accepted as being responsible for the reduced returns in the following decades. The 2011 estimate is preliminary.

Source: Reproduced from Exhibit 1967, p.4.

In terms of productivity, a think tank of scientists organized by Simon Fraser University and the Pacific Fisheries Resource Conservation Council expressed the decline by comparing the number of adults returning to spawn (recruits) to the number of spawning adults four years previously (see

Figure 1.1.2). If the number of recruits is lower than the parental numbers, the stock would appear to be in decline. Between the early 1990s and 2009, there was a steady and profound decline, to the point where the number of recruits per spawner was well below the replacement level.

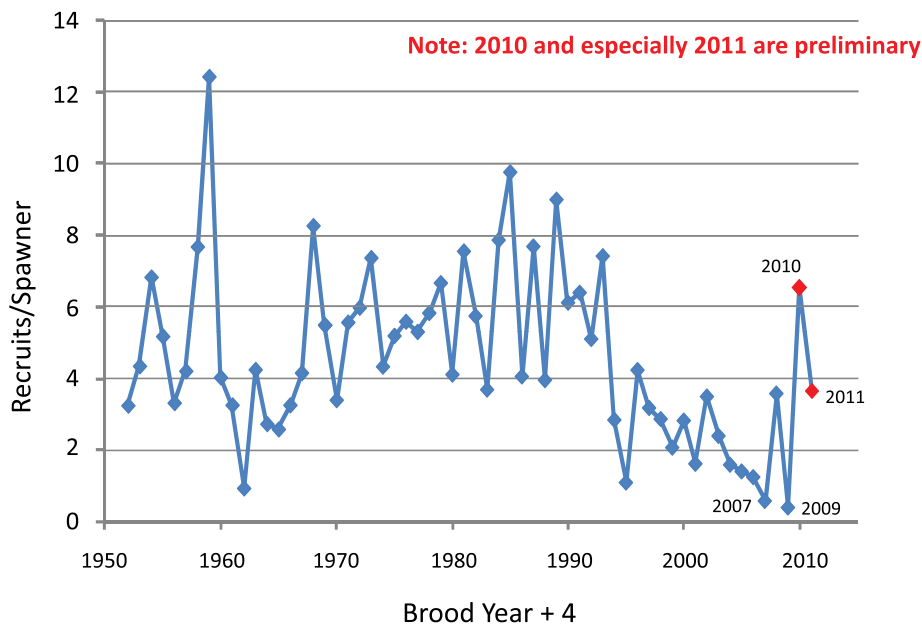


Figure 1.1.2 Annual variation in total Fraser River sockeye productivity, 1950s–2011

Source: Exhibit 1851.

The steady decline of this resource over the past several decades has put enormous pressure on Aboriginal and non-Aboriginal communities that depend on the sockeye salmon, whether for Aboriginal food, social, and ceremonial purposes, recreational pursuits, or livelihood.

In 2009, a record low number of sockeye salmon returning to the Fraser River led to the closure of the fishery for the third consecutive year, despite favourable pre-season estimates of the number of sockeye salmon expected to return. However, as figures 1.1.1 and 1.1.2 show, there was a dramatic improvement in both abundance and productivity in 2010 and, to a lesser extent, in 2011.

■ Establishment of the Commission

In November 2009, the Governor General in Council issued Order in Council 2009-1860 establishing this Commission of Inquiry and appointing me as sole Commissioner under Part 1 of the *Inquiries Act* to investigate this decline of sockeye salmon in the Fraser River.¹

The same Order in Council set the Commission's Terms of Reference. The Order in Council with complete Terms of Reference appears as Appendix A. In brief, the Terms of Reference direct me

- (A) to conduct the Inquiry without seeking to find fault on the part of any individual, community or organization, and with the overall aim of respecting conservation of the sockeye salmon stock and encouraging broad cooperation among stakeholders,
- (B) to consider the policies and practices of the Department of Fisheries and Oceans (the "Department") with respect to the sockeye salmon fishery in the Fraser River – including the Department's scientific advice, its fisheries policies and programs, its risk management strategies, its allocation of Departmental resources and its fisheries management practices and procedures, including monitoring, counting of stocks, forecasting and enforcement,

- (C) to investigate and make independent findings of fact regarding
 - (I) the causes for the decline of Fraser River sockeye salmon including, but not limited to, the impact of environmental changes along the Fraser River, marine environmental conditions, aquaculture, predators, diseases, water temperature and other factors that may have affected the ability of sockeye salmon to reach traditional spawning grounds or reach the ocean, and
 - (II) the current state of Fraser River sockeye salmon stocks and the long term projections for those stocks, and
- (D) to develop recommendations for improving the future sustainability of the sockeye salmon fishery in the Fraser River including, as required, any changes to the policies, practices and procedures of the Department in relation to the management of the Fraser River sockeye salmon fishery[.]

Although there have been several dozen examinations, investigations, and reports on various aspects of the Pacific fishery during the past three decades, this Commission's mandate is broader than the mandates of previous examinations. It calls for a consideration of all aspects of the policies and practices of the Department of Fisheries and Oceans (DFO)* in relation to the management of the Fraser River sockeye salmon fishery and an investigation – not limited to any one year's return – of the biological, ecological / environmental, and other causes of its decline. It is also the first Commission of Inquiry established under the authority of the *Inquiries Act* dealing with the Fraser River sockeye fishery since the 1982 Pearse Commission on Pacific Fisheries Policy.

■ Interpretation of the Commission's mandate

Several aspects of the Commission's mandate warrant preliminary comment.

* In this Report, the acronym DFO, and sometimes "the department," will be used to denote Fisheries and Oceans Canada.

Mandate to encourage broad co-operation among stakeholders

One of the provisions of the Terms of Reference unique to this Inquiry was the direction “to conduct the Inquiry without seeking to find fault on the part of any individual, community or organization.” Rather, I was mandated to encourage broad co-operation among stakeholders. I am pleased to report that throughout the Inquiry’s proceedings, counsel for the various participants, while vigorously advancing their clients’ interests, acted with a high degree of professionalism in adopting a collaborative and co-operative approach. This enabled the Commission to gather information and evidence upon which to build a better and clearer understanding about the past declines to place the Commission in a position to recommend the necessary steps and solutions for ensuring the future sustainability of the Fraser River sockeye salmon fishery.

Early in my mandate, an application was made to interpret the direction “to conduct the Inquiry without seeking to find fault ...” In my ruling, I found that those words clearly directed me to conduct the Inquiry without focusing on assigning fault to any individual, community, or organization, and to encourage co-operation among the stakeholders. However, I also found that the direction did not preclude me from making any particular findings. In the event that the evidence led me to the conclusion that any individual, community, or organization had engaged in conduct that directly or indirectly was a factor causing or contributing to the decline of Fraser River sockeye salmon, or in conduct that was the basis for recommendations to change policies, practices, or procedures in relation to management of the fishery, the direction did not limit the scope of the findings or recommendations that I was able to make.

The full version of my ruling is found on the DVD accompanying this Report.

Causes of the decline of Fraser River sockeye salmon

The Terms of Reference direct me to investigate and make independent findings of fact regarding the causes of the decline of Fraser River sockeye salmon. Various biological and ecological issues

are enumerated, but the words “including, but not limited to” invite me to consider other possible causes as well.

The manner in which Fraser River sockeye stocks have been managed during the period of the decline is an important matter that warrants examination, for several reasons. First, the preamble to the Terms of Reference acknowledges that the decline “has been attributed to the interplay of a wide range of factors, including environmental changes along the Fraser River, marine environmental conditions and fisheries management.” Second, the Terms of Reference specifically direct me to consider the policies and practices of DFO with respect to the sockeye salmon fishery in the Fraser River, including:

- the department’s scientific advice;
- its fisheries policies and programs;
- its risk management strategies;
- its allocation of departmental resources; and
- its fisheries management practices and procedures, including monitoring, counting of stocks, forecasting, and enforcement.

Improving the future sustainability of the Fraser River sockeye fishery

The only matter on which I am invited to make recommendations to the Government of Canada relates to improving the future sustainability of the sockeye salmon fishery in the Fraser River. I must interpret that directive in a manner consistent with the other paragraphs of the Terms of Reference, which direct me to consider DFO’s policies and practices with respect to the Fraser River sockeye fishery and to make independent findings of fact regarding the causes of the decline of the Fraser River sockeye stocks.

The scope of my recommendations for improving the future sustainability of the Fraser River sockeye fishery will be informed by the breadth of my fact-finding mandate, and by the context in which that mandate was created – the decline of Fraser River sockeye stocks since the early 1990s. It is that decline that the Government of Canada seeks to reverse by instituting measures to improve the future sustainability of the Fraser River sockeye

fishery. I am invited to make recommendations to that end. The Terms of Reference specifically invite me to recommend changes to DFO's policies, practices, and procedures in relation to the management of the Fraser River sockeye salmon fishery. However, the word "including" leaves open the possibility of making recommendations on other matters as well.

Aboriginal rights and title

Although the Terms of Reference are silent on the matter of Aboriginal rights and title, this Commission of Inquiry respectfully acknowledges the special relationship that many First Nations have with Fraser River sockeye salmon. They have fished these waters for sustenance for millennia and, through their traditions, ceremonies, and traditional ecological knowledge, bring a unique perspective to bear on this Inquiry's work.

Aboriginal people also possess a unique legal status in relation to Fraser River sockeye, based on section 35 of the *Constitution Act, 1982*, which states "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."² For example, in 1990 the Supreme Court of Canada recognized for the first time, in *R. v. Sparrow*, an Aboriginal right to fish for food, social, and ceremonial purposes, and stated that such a right would be treated with priority, subject only to conservation.³

In addition, several historical and modern treaties negotiated between the Crown and First Nations refer to Aboriginal access and participation in fisheries, and therefore must be considered as part of the legal framework underlying the management of Fraser River sockeye.

Aboriginal and treaty rights are discussed in more detail in Chapter 3, Legal framework.

■ The Commission's process for gathering evidence

In order to develop an evidentiary basis for making the findings of fact and recommendations mandated by the Terms of Reference, this Commission acquired information from a variety of sources.

Interim Report

Taking direction from the Terms of Reference, I published an Interim Report in October 2010, setting out my views on any previous examinations, investigations, or reports deemed relevant to the Inquiry, and on Canada's responses to them. Previous reports were an important source of information. Over the past three decades, there have been dozens of reports on the Pacific fisheries, primarily focusing on DFO's management of the fisheries and its activities respecting harvesting, protection of habitat, protection of wild salmon stocks, and aquaculture. Some, such as Dr. Peter Pearse's 1982 report, were sweeping in nature, examining the condition, management, and utilization of all Pacific coast fisheries. Others, such as the Honourable Bryan Williams's 2005 report, which examined only the 2004 Fraser River sockeye salmon return, focused on a single event.

In my October 2010 Interim Report, entitled *Fraser River Sockeye Salmon: Past Declines. Future Sustainability?*, I discussed 26 of those reports, and summarized the recommendations contained in them and the federal government's initial responses to them. Under the Commission's Terms of Reference, I may consider the findings of these previous reports, as I consider appropriate and relevant, and give them any weight, including accepting them as conclusive.

In my Interim Report, I also discussed the input received by the Commission in response to its June 2010 discussion paper, which outlined the salmon management and technical and scientific issues the Commission intended to investigate, as well as our public forums in 10 coastal and Fraser River communities and our 14 site visits in 12 British Columbia communities. A more detailed description of the Commission's activities before and after the release of the Interim Report can be found in Volume 3, Chapter 5, Commission process.

Public submissions, scientific evidence, and evidentiary hearings

Throughout the Inquiry, members of the public were invited to express their views on issues related to the Commission's mandate by mail, by making a public submission on the Commission's website, or by commenting on another person's

submission. The Commission received approximately 900 submissions, which are referred to throughout this Report.

The Commission undertook a scientific research program, directed by our in-house fisheries research consultant, to investigate possible causes of the decline of Fraser River sockeye. Terms of reference were developed for a series of technical reports, which were contracted out to technical researchers knowledgeable in the respective fields on which they reported. In total, the researchers produced 15 technical reports. Under the Commission's Rules for Procedure and Practice (available on the DVD included with this Report), I may consider these technical reports in making my findings of fact and recommendations. The technical reports are discussed in Volume 2 of this Report; executive summaries are included as Appendix B to Volume 2; and each report is reproduced in full in the DVD accompanying this Report.

In April 2010, I made 21 grants of standing for participation in the Commission. Many of these grants of standing were shared among applicants who originally applied individually. In total, 53 individuals, groups, and organizations were included in these grants of standing.

Between October 2010 and September 2011, I conducted the evidentiary hearings, which were open to the media and public.* Most of the hearings were held at the Federal Court in downtown Vancouver, BC. Hearings were reopened in December 2011 to consider emerging evidence on infectious salmon anemia (ISA) virus. Each witness testified under oath or affirmation, either alone or as a member of a panel.† Each was questioned by Commission counsel and cross-examined by participants or participants' counsel.‡ Witnesses included DFO senior management and employees, officials from the Province of British Columbia and local governments, independent scientists, conservationists, representatives of the aquaculture industry, and representatives of the commercial, sport, and Aboriginal fisheries. The authors of the Commission's technical reports were also questioned and cross-examined on their reports.

The Commission held 133 days of evidentiary hearings, during which 179 witnesses testified, 2,145 documents were filed as exhibits, and 14,166 pages of transcript were generated. Exhibits and transcripts were posted on the Commission's website, giving the media and public full access to our proceedings. All hearing transcripts and the exhibits referred to in this Report are included in the accompanying DVD.

Commission counsel also prepared 21 policy and practice reports on a wide range of legal topics and on numerous salmon management policies and practices.§ These reports were circulated to all participants in advance of evidentiary hearings on the corresponding topics, and were also filed as exhibits. They are part of the DVD included with this Report. Under the Commission's Rules for Procedure and Practice, I may consider these reports and the documents they reference in making my findings of fact and recommendations.

At the conclusion of the evidentiary hearings, I received extensive written and oral final submissions from participants respecting the matters into which I have been directed to inquire, including recommendations for improving the future sustainability of the Fraser River sockeye salmon fishery. In April and May 2012, I invited participants to provide supplementary submissions, if they wished, on how their submissions were affected by proposed changes to a number of pieces of legislation relevant to the work of the Commission contained in Bill C-38 (On June 29, 2012, Bill C-38, *An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*, received royal assent.)

All the sources of information and evidence discussed above have formed the basis of this Report, including my findings of fact and recommendations.

Introduction to the Fraser River sockeye fishery

My Terms of Reference direct me to develop recommendations for improving the sustainability

* For a list of general topics covered in the evidentiary hearings, see Volume 3, Appendix F, Hearings.

† For a list of witnesses who testified before the Commission, see Volume 3, Appendix E, Witnesses.

‡ For a list of Commission and participants' counsel, see Volume 3, Appendix G, Hearing counsel.

§ For a list of policy and practice reports, see Appendix E of this volume, List of Policy and Practice Reports.

of the Fraser River sockeye fishery. I interpret this as direction to consider the Fraser River sockeye fishery as a whole. However, this fishery is multi-faceted and comprises three distinct harvest sectors: the Aboriginal communal fishery, the general commercial fishery, and the recreational fishery. Here, I provide a brief introduction to each of these harvest sectors; they are discussed in greater detail throughout my Report.

Aboriginal communities have been fishing Fraser River sockeye for all of living memory. While British Columbia is home to a diverse population of Aboriginal cultures, I heard that many groups share a sense of cultural identity deeply rooted in the salmon fishery. This identity includes a profound respect for salmon, which are sometimes viewed as relatives or kin as opposed to simply as fish.⁴ Respect for salmon is passed down from Aboriginal elders to younger generations⁵ and is instilled in the laws of Aboriginal nations.⁶ Several witnesses told me that Aboriginal participation in the Fraser sockeye fishery is a vital means to preserve Aboriginal cultural practices and traditions. For example, Councillor June Quipp of the Cheam Indian Band told me that the salmon fishery is a part of her community's "spirit,"⁷ and Chief Fred Sampson of the Siska Indian Band told me that his community's cultural, physical, and spiritual well-being are all dependent on the salmon fishery.⁸

Aboriginal communal fishing licences authorize fishing for food, social, and ceremonial purposes. In respect of fishing for these purposes, Aboriginal groups enjoy a priority of access to Fraser River sockeye, subject to conservation. In addition, some Aboriginal communal fishing licences may authorize fishing for economic purposes, where fish caught may be sold. DFO's policy is to provide the same priority of access to Aboriginal groups for communal economic fishing as enjoyed by the general commercial fishery.

The decline of Fraser River sockeye has affected Aboriginal communities in several ways. Some witnesses told me that their Aboriginal communities were not harvesting enough salmon to meet basic food needs.⁹ Grand Chief Clarence Pennier of the Stó:lō Tribal Council told me that the loss of sockeye salmon as a food source has forced some members of his community to purchase lower-quality foods.¹⁰ Other witnesses suggested that having less salmon to

eat was contributing to increasing diabetes in their communities.¹¹ The decline of Fraser River sockeye has also meant that some Aboriginal communities have had fewer opportunities to practise their traditional fishing cultures.¹² Chief Sampson told me that without the ability to practise traditional fishing methods, his community has suffered a cultural loss, a language loss, and a loss in transferring knowledge to children.¹³

Recreational fishing, that is, non-commercial fishing to provide food for personal use or as a leisure activity,¹⁴ has been an "icon of west coast lifestyle" for well over a hundred years.¹⁵ It allows Canadians to engage in a social activity that connects them with their natural environment¹⁶ and is recognized by many as an important part of life in this province.¹⁷ Most recreational fishers on the Fraser River are residents of British Columbia: families and friends enjoying time together.¹⁸

The recreational fishery also brings considerable economic benefits to British Columbia. Visitors come from all over the world to participate in the recreational salmon fishery and hundreds of thousands of local residents participate as well.¹⁹ This activity generates thousands of jobs²⁰ (as many as 7,700 jobs in 2005) and contributes hundreds of millions of dollars to British Columbia's gross domestic product (GDP).²¹ Although the recreational fishery is only allocated a small proportion of the total salmon harvest,²² it has contributed as much as 40 percent of the GDP value of all fisheries in British Columbia, including aquaculture.²³ Recreational fishery licences and salmon retention fees also provide the federal government with millions of dollars in revenue each year.²⁴

The decline of Fraser River sockeye has affected the recreational fishery significantly. Salmon fishing has been the "backbone" of the recreational fishery since the late 1800s²⁵ and Fraser River sockeye are particularly important to the in-river fishery.²⁶ In marine areas, the recreational salmon catch dropped in the mid-2000s to less than 10 percent of what it was in the early 1980s.²⁷ In-river recreational salmon fishing is described as a "very sporadic opportunity" with no recreational sockeye catch allowed in 2007 or 2009 and only five days of sockeye harvest allowed in 2008.²⁸ Although higher returns in 2010 allowed for more days of recreational sockeye fishing, uncertainty in sockeye abundance and

years of no recreational allocation affect the predictable and stable fishing opportunities sought by recreational fishers.²⁹

The general commercial fishery has played an important role in the industrial development of British Columbia since Confederation.³⁰ For well over a hundred years, this fishery has provided economic opportunities to a diverse group of Canadians, including those with Aboriginal, European, and Asian ancestry.³¹ Many commercial fishers come from established fishing families that have caught and sold Fraser River sockeye for generations, supporting the economic well-being of their local communities along the way.³² Chief Edwin Newman of the Heiltsuk First Nation told me that participation in the commercial fishery had brought pride and independence to his community.³³

The general commercial fishery has also provided considerable economic benefits to British Columbia, with wild salmon products exported to 63 countries around the world.³⁴ In the mid-1990s, the general commercial fishery landed as much as 42,500 tonnes of salmon valued at \$195.2 million.³⁵ Preliminary estimates of the 2010 season indicate that 31,100 tonnes of wild salmon were harvested for a landed value of \$91.3 million.³⁶ After processing, these values can “almost double.”³⁷ Of all the salmon species,

sockeye is economically the most important owing to its higher market value.³⁸ Over 2,000 commercial salmon licences are issued in the Pacific Region each year, creating thousands of jobs for fish harvesters and processors, many of whom are Aboriginal.³⁹

In recent years, however, the general commercial fishery has suffered from the decline of Fraser River sockeye. In the past decade there have been several years with little or no commercial fishing opportunities for Fraser River sockeye; these include the years 2005, 2007, 2008, and 2009.⁴⁰ As a result, salmon fishers have seen the value of their commercial fishing licences steadily decline over this period,⁴¹ and some fishers dependent on Fraser River sockeye have failed to break even on costs.⁴² This has affected not only individual fishers, but also the many communities that they support, particularly those remote coastal communities that rely on fisheries as a major source of employment and economic well-being.⁴³

I recognize that the Fraser River sockeye fishery is a vital part of British Columbia’s identity. Each of the three harvest sectors that comprise this fishery carries important historical, societal, and economic characteristics that I take into account throughout this Report.

Notes

- 1 *Inquiries Act*, RSC 1985, c. I-11.
- 2 *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c. 11.
- 3 *R. v. Sparrow*, [1990] 1 SCR 1075, [1990] SCJ No 49.
- 4 Exhibit 279, p. 4; Exhibit 278, p. 4; Fred Sampson, Transcript, December 14, 2010, pp. 7-8.
- 5 Exhibit 294, pp. 2-3.
- 6 For example, in Haida laws: Exhibit 299, pp. 2-3.
- 7 Exhibit 278, p. 3.
- 8 Exhibit 291, p. 2.
- 9 Exhibit 291, p. 2; Exhibit 292, p. 2.
- 10 Transcript, December 13, 2010, p. 20.
- 11 Exhibit 301, p. 3; Exhibit 292, p. 3.
- 12 Saul Terry, Transcript, December 14, 2010, p. 18; Exhibit 293, p. 2.
- 13 Transcript, December 14, 2010, p. 10.
- 14 Exhibit 946, p. 24.
- 15 Exhibit 527, p. 3.
- 16 Exhibit 527, p. 3.
- 17 Exhibit 527, p. 11.
- 18 Devona Adams, Transcript, March 2, 2011, p. 7.
- 19 PPR 7, pp. 3, 14; Exhibit 527, p. 11.
- 20 Exhibit 548, p. 21; Exhibit 946, p. 24.
- 21 Exhibit 946, p. 24.
- 22 Exhibit 264, p. 25.

- 23 Exhibit 548, p. 1; Exhibit 946, p. 24.
- 24 PPR 7, p. 14; Exhibit 548, p. 20.
- 25 Devona Adams, Transcript, March 2, 2011, p. 5.
- 26 Debra Sneddon, Transcript, March 2, 2011, p. 8.
- 27 Exhibit 548, p. 22.
- 28 Debra Sneddon, Transcript, March 2, 2011, p. 8.
- 29 Debra Sneddon, Transcript, March 2, 2011, p. 8.
- 30 Exhibit 1135, p. 10.
- 31 Exhibit 1135, p. 14.
- 32 Russ Jones, Transcript, June 30, 2011, pp. 26-27; Rod Naknakim, Transcript, December 15, 2010, p. 7.
- 33 Exhibit 300, p. 2; Edwin Newman, Transcript, December 15, 2010, p. 30.
- 34 Exhibit 946, p. 28.
- 35 Exhibit 508.
- 36 Exhibit 508.
- 37 Rob Morley, Transcript, March 1, 2011, p. 84.
- 38 Exhibit 946, p. 26; Exhibit 507, pp. 4, 7.
- 39 Exhibit 1978; Exhibit 946, p. 28.
- 40 PPR 18, pp. 44-45.
- 41 Exhibit 946, p. 28.
- 42 Exhibit 946, p. 28.
- 43 Exhibit 577, p. 4.