Chapter 3 • Legal framework

The Fraser River sockeye salmon fishery operates in a complex legal environment. This chapter provides an overview of that legal framework. The overview is based on legislation and case authority, the policy and practice reports filed with the Commission,[1] and participants' submissions on the content of these policy and practice reports.

Canadian constitutional law and principles

The statutory and regulatory framework governing the fishery derives its authority from the Canadian Constitution. Sections 91 and 92 of the *Constitution Act, 1867*, set out the legislative competence of the federal parliament and provincial legislatures.[2] In some cases, there is overlap between federal and provincial jurisdiction. The specific areas of overlap that relate to the Fraser River sockeye salmon fishery are discussed in this chapter, as well as in chapters on specific topics.

Federal jurisdiction over the fisheries – *Constitution Act, 1867*

The *Constitution Act, 1867*, divides the subject areas over which the federal and provincial governments have control. Under subsection 91(12), Parliament has exclusive legislative authority for all matters in relation to "Sea Coast and Inland Fisheries," which encompasses the obligation to manage the country's fisheries. Under subsection 92(13), the Province of British Columbia has exclusive legislative authority over "property and civil rights in the province." When the colony of British Columbia joined Confederation in 1871, it ceded jurisdiction over its fisheries to Canada.[3] This grant of exclusive federal legislative jurisdiction over seacoast and inland fisheries did not convey to Canada any proprietary right to those fisheries, which were and remain a "common property resource belonging to all the people of Canada."[4] Federal regulation of fisheries began in 1868 with the enactment of the first *Fisheries Act* (now RSC 1985, c. F-14). Property

rights in the fishery that were previously vested in private individuals or the provinces were not altered by the *Constitution Act, 1867*.[5] The federal power over fisheries is not confined to the conservation of fish stocks, but extends more broadly to the maintenance and preservation of the fishery as a whole, including its economic value.[6]

The federal government also has jurisdiction over some matters associated with marine pollution and protection of the environment, although the regulation of matters relating to protection of the environment includes several areas that are within the jurisdiction of the provinces. This overlap is discussed in more detail below.

Ultimate authority of the minister

In decisions arising in the Aboriginal rights context, the Supreme Court of Canada has found that, if the fishery is to survive, it must be managed by the federal government as a central authority:

> If the salmon fishery is to survive, there must be some control exercised by a central authority. It is the federal government which will be required to manage the fishery and see to the improvement and the increase of the stock of that fishery. It is for the federal government to ensure that all users who are entitled to partake of the salmon harvest have the opportunity to obtain an allotment pursuant to the scheme of priorities set out in *Sparrow*.[7]

The Supreme Court of Canada has stated that the responsibility for conservation of the fisheries resource is placed squarely on the minister and not on Aboriginal or non-Aboriginal users of the resource.[8] The courts have yet to recognize an Aboriginal right to manage the Fraser River sockeye salmon fishery.

Even where Aboriginal rights in the fishery are found to exist and the government is required to ensure that its management plans give full effect to those rights, "the constitutional entitlement embodied in s.35(1) [recognizing existing Aboriginal and treaty rights] ... is not to undermine Parliament's ability and responsibility with respect to creating and administering overall conservation and management plans regarding the fishery."[9] The government is also required to make decisions that affect harvest allocations and fishery access between Aboriginal peoples and non-Aboriginal peoples, and among different groups of Aboriginal peoples who hold different rights in the fishery.[10] (Aboriginal rights are discussed further below.)

Conservation mandate of the Department of Fisheries and Oceans

The Supreme Court of Canada recognized the broad legislative jurisdiction of the federal government in the conservation and maintenance of the fisheries as early as 1882. In *The Queen v. Robertson*, the Supreme Court of Canada interpreted the federal power to legislate pursuant to subsection 91(12) of the *Constitution Act* as extending "to subjects affecting the fisheries generally, tending to their regulation, protection and preservation."[11] In *Interprovincial Co-Operatives Ltd. v. The Queen*, Chief Justice Laskin wrote that the federal fisheries power "is concerned with the protection and preservation of fisheries as a public resource."[12]

In *Ward v. Canada (Attorney-General)*, the Supreme Court of Canada considered a number of authorities on the extent of the federal government's power to regulate the sale of fish and concluded that "[t]he rationale [of any federal power to regulate sale of fish] is that the federal government may limit sales in order to prevent injurious exploitation of the resource."[13] The Court also concluded that "[m]easures that in pith and substance ... go to the maintenance and preservation of the fisheries fall under federal power."[14]

The federal government has legislated extensively in respect of its mandate for the conservation and maintenance of fisheries. The primary legislative exercise of the federal conservation mandate is subsection 43(*b*) of the *Fisheries Act*, which provides the power to the Department of Fisheries and Oceans (DFO) to make regulations "respecting the conservation and protection of fish." The *Oceans Act* and many of the other statutes discussed in this chapter and elsewhere in this Report flow from the federal power over conservation and maintenance of the fishery. DFO has regulated extensively pursuant to subsection 43(*b*).

In the 1980 decision in *Jack v. The Queen*, a case which precedes the enactment of section 35 of the *Constitution Act, 1982*, Justice Dickson set out the primary importance of conservation in the management of fisheries:

> Conservation is a valid legislative concern. The appellants concede as much. Their concern is in the allocation of the resource after reasonable and necessary conservation measures have been recognized and given effect to. They do not claim the right to pursue the last living salmon until it is caught. Their position, as I understand it, is one which would give effect to an order of priorities of this nature: (i) conservation; (ii) Indian fishing; (iii) non-Indian commercial fishing; or (iv) non-Indian sports fishing; the burden of conservation measures should not fall primarily upon the Indian fishery.
>
> I agree with the general tenor of this argument ... With respect to whatever salmon are to be caught, then priority ought to be given to the Indian fishermen, subject to the practical difficulties occasioned by international waters and the movement of the fish themselves. But any limitation upon Indian fishing that is established for a valid conservation purpose overrides the protection afforded the Indian fishery by art. 13, just as such conservation measures override other taking of fish.[15]

In its 1990 decision in *R. v. Sparrow*, the Supreme Court of Canada followed the above passage from *Jack* in determining that conservation takes precedence over the food, social, and ceremonial (FSC) fishery as follows:

> The constitutional nature of the Musqueam food fishing rights means that any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing. If the objective pertained to conservation, the conservation plan would be scrutinized to assess priorities. While the detailed allocation of maritime resources is a task that must be left to those having expertise in the area, the Indians' food requirements must be met first when that allocation is established.[16]

Subsequent to *Sparrow*, several DFO policies set out that conservation is the department's primary mandate. (See discussion in Chapter 4, DFO overview.)

Aboriginal and treaty rights

Legal historical context: regulation of Aboriginal fishing to 1982

In recognizing the current legal framework for Aboriginal fishing, several participants suggested that I consider the historical regulation of Aboriginal participation in the fishery. Dr. Douglas Harris, professor of law, University of British Columbia, prepared a report for the Commission entitled "The Recognition and Regulation of Aboriginal Fraser River Sockeye Salmon Fisheries to 1982."[17] I qualified Dr. Harris as an expert in the legal history of Aboriginal fisheries in British Columbia.[18] His report covered three main topics: the development of Canadian laws, regulations, and jurisprudence related to Aboriginal participation in the Fraser River sockeye fishery; the development of historical treaties in British Columbia; and the practice of coastal reserve allotments or reserve allotments adjacent to the Fraser River or its tributaries.[19]

Dr. Harris described the development of laws, regulations, and licensing policies on the participation of Aboriginal peoples in the industrial fishery, as well as on the regulation of a food fishery. Aboriginal fishers "were a crucially important part of the labour force in the early industrial fishery."[20] However, their participation was reduced in absolute numbers following the introduction of limited commercial licences in the late 1880s and proportionally by the increased involvement of non-Aboriginal fishers through the early 1900s.[21] The creation of a separate Aboriginal food fishery under the *Fisheries Act* also affected Aboriginal fishing.[22] Dr. Harris describes the food fishery as a "legal construct" created in the late 19th century and continuing through to the present.[23]

Regarding the development of historical treaties, Dr. Harris described the 14 agreements entered into between the Hudson's Bay Company (on behalf of the British Crown) and Aboriginal groups on Vancouver Island.[24] These agreements are better known as the "Douglas Treaties," after Governor James Douglas, the Hudson's Bay Company's chief trader and governor of the colony of Vancouver Island.[25] The Douglas Treaties contain the following clause: "It is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly."[26] While this

provision relates to a treaty right in relation to the fishery, Dr. Harris agreed that such right has "not been definitively interpreted in a Canadian court."[27] Although Dr. Harris's personal view is that the provision is to be broadly construed as a recognition of existing rights, he agreed that this is "an unresolved area" with "differing perspectives."[28]

Regarding the creation of coastal reserve allotments or reserve allotments adjacent to the Fraser River or its tributaries, Dr. Harris wrote that the process of allotting Indian reserves began under the Douglas Treaties, continued sporadically through the colonial era, and recommenced with the formation of the Joint Indian Reserve Commission in 1876.[29] The Joint Indian Reserve Commission allotted more than 1,500 reserves throughout British Columbia, which, in total, amount to slightly more than one-third of 1 percent of the provincial land area.[30] Dr. Harris said that most of these reserves are connected to salmon fisheries and the best way to understand British Columbia's reserve geography is "that these reserves were really securing access to the fishery."[31] Several Aboriginal participants adopted this view and suggested to me that Governor Douglas and other reserve commissioners intended in these reserve allotments to recognize Aboriginal rights to fish.[32] Although I make no determination on rights, I note that in the recent *Lax Kw'alaams Indian Band v. Canada (Attorney General)* decision, the Supreme Court of Canada upheld a trial court's finding that, on the facts of that case, "the Crown ... never intended in the process of allocating reserves to grant ... preferential access to the fishery."[33]

Recognition of Aboriginal and treaty rights: Constitution Act, 1982

Section 35(1) of the *Constitution Act, 1982*, provides that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[34] As the first inhabitants of North America, the Aboriginal peoples of Canada are accorded special legal and constitutional protections.* Chief Justice Lamer explained this in *R. v. Van der Peet* in 1996*:*

> In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples *were already here*, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.[35] [Emphasis in the original.]

The recognition and affirmation of Aboriginal and treaty rights serves to ensure the continued existence of distinctive Aboriginal societies and to provide them with "cultural security and continuity."[36] As such, Aboriginal rights will vary among Aboriginal societies "in accordance with the variety of aboriginal cultures and traditions which exist in this country."[37] The same Aboriginal rights are not held uniformly by all Aboriginal peoples in Canada.

In *Van der Peet*, the Supreme Court of Canada set out the test for identifying an Aboriginal right protected by section 35 of the *Constitution Act, 1982*:

> [I]n order to be an aboriginal right, an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.[38]

The existence and scope of Aboriginal rights must be determined after a full hearing that is fair to all stakeholders and requires consideration of each of the components of the *Van der Peet* test.[39]

A practice, custom, or tradition: Aboriginal rights are founded on practices, customs, or traditions, rather than common law property concepts or the importance of a resource to an Aboriginal group.[40] As explained in *R. v. Sappier* and *R. v. Gray,* the right to fish may protect a traditional means of sustenance or a pre-contact practice that was relied on for survival, but "there is no such thing as an aboriginal right to sustenance" or a right to the fish themselves.[41] In addition, the right to fish is a site-specific right limited to identifiable geographic areas, rather than an abstract right exercisable anywhere.[42]

* Section 35(2) of the *Constitution Act, 1982*, defines the "aboriginal peoples of Canada" as including the Indian, Inuit, and Métis peoples of Canada.

Integral to: In *Van der Peet*, the Court suggested that in order to be "integral," a practice, custom, or tradition must be "a central and significant part of the society's distinctive culture."[43] This does not require that the practice on which an Aboriginal right is based go to the "core" of a society's identity or be its single most important defining characteristic.[44] However, it must be "independently significant" and must not "exist simply as an incident to another practice, custom or tradition."[45]

Distinctive culture: What constitutes an Aboriginal group's culture is determined taking into account the perspective of the Aboriginal peoples themselves and the relationship of Aboriginal peoples to the land.[46] This determination requires an inquiry into the "way of life of a particular aboriginal community, including their means of survival, their socialization methods, their legal systems, and, potentially, their trading habits."[47] The qualifier "distinctive" is added to incorporate an element of "aboriginal specificity" but is not meant to reduce aboriginality to "racialized stereotypes of aboriginal peoples."[48] Also, distinctive does not mean "distinct" as more than one Aboriginal group may hold the same Aboriginal right.[49]

Group claiming the right: Aboriginal rights are held communally by an Aboriginal people rather than by an Aboriginal person. Section 35 recognizes and affirms Aboriginal rights in order to ensure the continued existence of Aboriginal societies.[50] Therefore, the right to harvest a resource cannot be held independently of the Aboriginal society that the right is meant to protect.[51]

Aboriginal and treaty rights do not exist in a vacuum. The Supreme Court of Canada explained that "distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign."[52] The constitutional entrenchment of Aboriginal rights provides a framework for the protection of distinctive Aboriginal societies, so that their prior occupation can be reconciled with the sovereignty of the Crown.[53] In *Mitchell v. M.N.R.*, Justice Binnie said that "[t]he constitutional objective is reconciliation not mutual isolation."[54] Similarly, he explained in *Mikisew Cree First Nation v. Canada* that "[t]he fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions."[55]

Right to fish for food, social, and ceremonial purposes

In *R. v. Sparrow* in 1990, the Supreme Court of Canada recognized for the first time an Aboriginal right to fish for food, social, and ceremonial (FSC) purposes:

> [F]or the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture. Its significant role involved not only consumption for subsistence purposes, but also consumption of salmon on ceremonial and social occasions. The Musqueam have always fished, for reasons connected to their cultural and physical survival.[56]

Drying sockeye, Lillooet, BC, 2010

As described above, the right to fish for FSC purposes carries with it a priority of allocation

to the fishery, subject only to conservation.[57] As guidance, the Court offered an operational description of this priority, suggesting that in years of low abundance it may be possible for all fish caught to be allocated for FSC purposes; the brunt of conservation measures are to be borne by the commercial and recreational fisheries.[58] However, the priority of FSC allocation is not without limits. It is "not to undermine Parliament's ability and responsibility with respect to creating and administering overall conservation and management plans regarding the salmon fishery."[59] Moreover, in *R. v. Quipp*, the BC Court of Appeal clarified that the priority of FSC fisheries does not require that they precede or occur contemporaneously with commercial and recreational fisheries.[60]

The Supreme Court of Canada also articulated the importance of understanding Aboriginal rights in a manner that is informed by, and sensitive to, the perspectives of the Aboriginal group claiming the right.[61] Aboriginal groups participating in this Inquiry have expressed their understanding of the right to fish as a broad right, which in their perspective includes the following: a responsibility to protect, conserve, and sustain the fishery; a responsibility to other Aboriginal peoples dependent on salmon; a right to fish for all purposes; a right to use all traditional and modern fishing methods; and a right and responsibility to maintain proper relations to the salmon and their ecology.[62]

Right to fish for economic purposes

As with other Aboriginal rights, the right to fish for economic purposes is determined according to the framework set out in *Van der Peet*, and depends on the particular practices, customs, and traditions of the Aboriginal group claiming the right. In *R. v. Gladstone*, the Supreme Court of Canada determined that the Heiltsuk people hold an Aboriginal right both to exchange herring spawn-on-kelp for money or other goods and to trade herring spawn-on-kelp on a commercial basis.[63] In *Ahousaht Indian Band and Nation v. Canada*, the BC Supreme Court concluded that five member bands of the Nuu-Chah-Nulth Nation hold an Aboriginal right to "fish for any species of fish within the environs of their territories and to sell that fish."[64] This case was appealed to the BC Court of Appeal, which largely upheld the lower court's decision but excluded fishing for geoduck as it is a fishery of recent origin.[65] In late summer 2011, Canada filed an application for leave to appeal this decision to the Supreme Court of Canada.[66] The Court remanded the decision back to the BC Court of Appeal for reconsideration in accordance with the Court's decision in *Lax Kw'alaams*.[67]

Several other groups have been unable to prove in court an Aboriginal right to fish for economic purposes. In *Van der Peet*, the Supreme Court of Canada determined that the Stó:lō people failed to demonstrate an Aboriginal right to exchange fish for money or other goods since this practice was not a central, significant, or defining feature of the Stó:lō society.[68] In *R. v. N.T.C. Smokehouse*, the Supreme Court of Canada also determined that the Sheshaht and Opetchesaht peoples do not hold a right to exchange fish for money or other goods because the pre-contact sales of fish were "few and far between."[69] The Court similarly did not find a Coast Tsimshian right to "harvest and sell on a commercial scale all species of fish and fish products found within the Lax Kw'alaams' claimed territories."[70] The BC Provincial Court did not find a Thompson or Shuswap right to exchange fish for money or other goods[71] or an Anahem or Ts'ilhqot'in right to sell salmon commercially.[72]

Where a right to fish for economic purposes exists, the form of priority that attaches to this right will be different than the priority that attaches to a right to fish for FSC purposes. Unlike FSC fishing rights, which are internally limited by the food, social, and ceremonial needs of the Aboriginal group holding the right, economic needs are limited only by market demand and the availability of the resource.[73] An economic fishing right does not grant an exclusive fishery to Aboriginal people and does not extinguish the common law right of public access to the fishery.[74] Rather, an economic right to fish requires that the government allocate the resource in a manner respectful of the fact that holders of constitutional rights have priority over other users.[75] In doing so, "objectives such as the pursuit of economic and regional fairness and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups" may be considered.[76]

The minister of fisheries and oceans need not await a judicial determination of rights before

providing Aboriginal groups with economic access to the fishery. In *R. v. Huovinen*, the BC Court of Appeal held that there was nothing to prevent the minister from authorizing the sale of fish caught under Aboriginal communal fishing licences, even in the absence of a proven Aboriginal commercial fishing right.[77] Where the objective underlying the provision of economic fisheries access is to ameliorate the disadvantaged position of an Aboriginal group, this will not be contrary to the equality provisions of the Charter.[78]

Duty to consult

The Crown has a duty to consult an Aboriginal group where it has knowledge of the potential existence of an Aboriginal or treaty right and contemplates conduct or a decision that may adversely affect such right.[79] A spectrum of consultation exists that depends on the strength of claim to an Aboriginal right and the seriousness of the potential adverse effect on that right.[80]

The Crown is expected to take a proactive and comprehensive approach to consultations. With regard to the fishery, DFO is expected to inform Aboriginal groups of conservation measures being taken[81] and how such measures affect other users of the resource.[82] DFO must "engage directly"[83] with Aboriginal peoples, though this does not necessarily require consultation with each Aboriginal group individually,[84] especially in the case of the Fraser River salmon fishery where a large number of Aboriginal groups may hold rights and interests.[85] With respect to the fishery, consultation must also be timely; this timeliness requires DFO to inform an Aboriginal group of planned conservation measures *before* they are implemented.[86]

Although the duty to consult is held by the Crown, "there is some reciprocal onus on the [Aboriginal group] … to make their concerns known, to respond to the government's attempt to meet their concerns and suggestions, and to try to reach some mutually satisfactory solution."[87] The Crown will not be prevented from taking action if an Aboriginal group refuses to participate in consultative processes.[88]

Good faith consultation may give rise to a duty to accommodate,[89] which may take a variety of forms.[90] Key to any consultative process is the Crown's willingness to make changes based on information that emerges during the consultation,[91] since the purpose is not simply to give the Aboriginal group "an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along."[92] However, consultation does not carry a duty to reach an agreement with the Aboriginal group whose rights may be adversely affected.[93] Accommodation does not amount to an Aboriginal "veto" over what can be done, but entails a "balancing of interests, of give and take."[94] As articulated by the Supreme Court of Canada in *Beckman v. Little Salmon / Carmacks First Nation*, the existence of a non-Aboriginal "stake in the situation is of considerable importance"[95] and at the end of the day "somebody has to bring consultation to an end and weigh up the respective interests."[96]

Treaty rights in the fishery

Several historical and modern treaties negotiated between the Crown and First Nations refer to Aboriginal participation in the fisheries. The Douglas Treaties are described above in the section on the legal historical context to 1982. In 1992, the BC Treaty Commission was established under the *Treaty Commission Act* to facilitate the negotiation of modern treaties in British Columbia.[97] At the time of writing this Report, the only modern agreements in force involving Fraser River salmon stocks are the Tsawwassen First Nation Final Agreement and the Maa-Nulth Final Agreement. In addition, the Yale First Nation Final Agreement, initialled by negotiators on February 5, 2010, has been ratified by the Yale First Nation and the province. Following ratification of the Yale First Nation Final Agreement by Canada, the parties will establish an effective date for the treaty.[98] For a further discussion of modern treaties, see the section on Aboriginal fishing policies and programs in Chapter 5, Sockeye fishery management.

Fisheries management in the context of Aboriginal and treaty rights

The law of Aboriginal and treaty rights is dynamic and evolving. Analytical frameworks for the determination of Aboriginal and treaty rights have been set out by the Supreme Court of Canada. However, these analyses have not been judicially applied

for most Aboriginal groups asserting rights in the Fraser River sockeye salmon fishery. The courts have not comprehensively determined fishing rights in British Columbia, and so there remains legal uncertainty as to the management, economic, geographic, or other dimensions that these rights may or may not include.

Aboriginal rights are not uniformly held and must be determined on a group-by-group basis in a fact-specific, contextual manner. I am advised that the determination of Aboriginal rights and title with respect to specific Aboriginal groups has entailed lengthy and intensive hearings over the course of months or years: the *Ahousaht* trial lasted 110 days, while the *Delgamuukw* and *Chilcotin* trials required 384 days and 339 days, respectively.[99] In comparison, I heard 133 days of testimony and submissions on a broad range of topics, not directed at determining the existence of Aboriginal rights.

I accept that the existence and content of Aboriginal rights is a controversial issue subject to ongoing litigation. Several participants appearing before me, Aboriginal and non-Aboriginal, submit that my Terms of Reference do not provide me with jurisdiction to make rulings or findings of fact in respect of Aboriginal or treaty rights and that I am not called upon to do so.[100] Considering my Terms of Reference and the timeframe for this Inquiry, I agree with participants that I am not well placed to make any determination of Aboriginal rights, including any right to fish.

As Commissioner, I am tasked with providing recommendations that will endure into the future, despite the dynamic and evolving nature of the law. In acknowledging the legal uncertainty that exists, my recommendations will consider fundamental principles of Aboriginal and treaty rights set out by the Supreme Court of Canada. In my view, many of these principles apply equally to policy as to rights. Although I will not rule on the existence or content of Aboriginal rights, I will consider the principles underlying Aboriginal and treaty rights as a guide.

Federal legislation

Several federal statutes govern the Fraser River sockeye salmon fishery.[101] Many of these statutes, as well as key regulations, are discussed below.

The *Department of Fisheries and Oceans Act*

The minister of fisheries and oceans exercises his or her responsibility for Canadian fisheries through the activities of the Department of Fisheries and Oceans. Although DFO has existed in some form since 1868, the federal government enacted the *Department of Fisheries and Oceans Act* in 1978. This legislation sets out the powers, duties, and functions of the minister and empowers the minister to enter into agreements with any province (or provincial agency) regarding fisheries programs.

The *Fisheries Act*

The *Fisheries Act* is the primary statutory authority for the management and regulation of fisheries in Canada. The *Fisheries Act* and its regulations provide legislative authority for the conservation of fisheries resources and habitat, for the establishment and enforcement of standards for conservation, and for the determination of access to and allocation of the resource.

Subsection 7(1) of the *Fisheries Act* provides the minister with broad discretion to issue or authorize licences and leases for fisheries or fishing, as informed and constrained by case law and administrative law principles. The key jurisprudence on section 7 has established the following:

- The provision was intended to give the minister very broad discretion and thus significant deference should be granted to the minister, and
- The minister's exercise of discretion is subject only to these things:
  - express limitations in the *Fisheries Act*, limitations imposed under the Act by regulations made under section 43 of the Act, and limitations imposed by other legislation;
  - constitutional limitations, land claims agreements, and case law; and
  - the requirements of administrative law, which include respect for the principles of natural justice, basing his or her decisions on relevant considerations, avoiding arbitrariness, and acting in good faith.[102]

Sections 32, 34, 35, and 36 provide the legislative basis for the environmental protection of fish and fish habitat.* These provisions afford protection for fish and fish habitat from destruction by "means other than fishing"[103] and by the general and specific prohibitions on depositing pollutants in Canadian fisheries waters.[104] Section 35 is the primary habitat protection provision. It prohibits "harmful alteration, disruption or destruction of fish habitat" (HADD).[105] Subsection 35(2) provides relief from this prohibition; it allows a HADD to occur with the minister's authorization, or pursuant to regulations. "Fish habitat" is a broad concept. It is defined as "spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes," in both marine and freshwater environments.[106]

While DFO's habitat-related regulatory work focuses on section 35, other sections of the *Fisheries Act* also relate to habitat protection and pollution prevention. These include the provisions regarding fishways (sections 20–22, 26, and 27), prohibitions on the use of explosives to hunt or kill fish (section 28), and prohibitions on the destruction of fish by any means other than fishing (section 32). (For a more detailed discussion of these provisions, see Chapter 7, Enforcement.)

Section 36 prohibits persons, except as authorized by regulation, from depositing or permitting the deposit of deleterious substances of any type "in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water."[107] This section of the *Fisheries Act* is administered by Environment Canada and not by DFO.

Regulations affecting the Fraser River sockeye fishery

The following regulations under the *Fisheries Act* govern the Fraser River sockeye salmon fishery and are discussed below:

- *Fishery (General) Regulations,* SOR/93-53
- *Pacific Fishery Regulations*, *1993*, SOR/93-54
- *Pacific Fishery Management Area Regulations, 2007*, SOR/2007-77
- *British Columbia Sport Fishing Regulations, 1996*, SOR/96-137
- *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332
- *Management of Contaminated Fisheries Regulations*, SOR/90-351
- *Pacific Aquaculture Regulations*, SOR/2010-270

The *Fishery (General) Regulations* govern the operation of the fisheries and apply to all fisheries (commercial, recreational, and Aboriginal communal fisheries). They contain provisions regarding the establishment and variation of fishery closures, fishing quotas, and fish size and weight limits (Part I); licences and registration (Part II); identification of fishing vessels and fishing gear (Part III); and fishery observers (Part V). These regulations also contain provisions that authorize DFO to engage personnel for enforcement and administration of the *Fisheries Act*, and they relate to fish habitat and enforcement matters (Part VI).

The *Pacific Fishery Regulations, 1993*, apply to commercial fisheries, and Part VI governs the salmon fishery. The *Pacific Fishery Management Area Regulations, 2007*, describe the surf line and divide the Canadian fisheries waters of the Pacific Ocean into management areas and sub-areas.[108] These management areas and sub-areas are referenced when describing fishery openings and closures.

The *British Columbia Sport Fishing Regulations, 1996*, apply to sport fishing in Canadian fisheries waters of the Pacific Ocean and of British Columbia, setting close times, fishing quotas, and size limits for all sport fisheries in the province. The *Aboriginal Communal Fishing Licences Regulations* cover the issuance of communal licences to Aboriginal organizations. The licences regulate communal fishing activities.

In addition, there are several regulations governing the discharge of effluents that could impact Fraser River sockeye (for example, pulp

* I note that Part 3, Division 5, of Bill C-38, *An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*, which received royal assent on June 29, 2012, amends these sections of the *Fisheries Act*. As a result, the references in this chapter to these sections may not reflect the current law in Canada. Bill C-38 is discussed in detail in Volume 3, Chapter 3, Legislative amendments.

and paper and metal mining effluents).[109] (Canada has recently proposed the Wastewater Systems Effluent Regulation; see Chapter 6, Habitat management.) The DFO regional director general (RDG) is authorized by the *Management of Contaminated Fisheries Regulations* to close any fishery if the RDG has reason to believe that fish in that area are contaminated.[110]

In February 2009, the BC Supreme Court determined in *Morton v. British Columbia (Agriculture and Lands)* that salmon aquaculture is a "fishery" under the jurisdiction of the federal government, striking down provincial legislation regulating salmon farms.[111] In July 2010, the proposed federal *Pacific Aquaculture Regulations* (PAR) under the *Fisheries Act* were posted to the *Canada Gazette* Part I. They came into force on December 18, 2010.[112] The PAR apply to aquaculture in the territorial sea of Canada off the coast of British Columbia, the internal waters of Canada off the British Columbia coast that are not within British Columbia, the internal waters of Canada in British Columbia and any facility in the province from which fish may escape into Canadian fisheries waters.[113] The PAR allow the minister to issue aquaculture licences.[114] Section 4 is the key provision; it enables the minister to make conditions of licence for the proper management and control of the fishery. The PAR also include prohibitions on aquaculture operators keeping incidental catch (section 5) and operating without a licence (section 7).

The *Oceans Act*

The *Oceans Act* is the primary piece of legislation governing oceans management. It mandates an integrated ecosystem-based approach to how ocean activities are managed. It specifies that DFO is to lead and coordinate activities to that end, and the competent minister is the minister of fisheries and oceans.[115] The *Oceans Act* provides the department with the authority to engage in integrated management, to establish marine protected areas, and to improve Canada's management of the marine environment.

Section 29 of the *Oceans Act* requires the minister to lead and facilitate the development and implementation of "a national strategy for the management of estuarine, coastal and marine ecosystems" in Canada's oceans. Section 30 of the *Oceans Act* specifies that the three principles on which the national strategy is based are sustainable development, integrated management, and the precautionary approach (see discussion of the precautionary principle / approach below). Section 31 requires the minister to lead the development of "plans for the integrated management of all activities or measures in or affecting" Canada's oceans. Section 32 directs or empowers the minister to develop and coordinate government policies and programs with respect to activities or measures affecting coastal and marine waters. Subsection 41(1)(*d*) of the *Oceans Act,* and section 180 of the *Canada Shipping Act, 2001*, provide that the Canadian Coast Guard (Coast Guard) is the lead federal agency responsible for ship source and mystery source pollution incidents in Canadian waters.[116]

Section 42 of the *Oceans Act* sets out the minister's powers with respect to marine sciences. It provides as follows:

> **42.** In exercising the powers and performing the duties and functions assigned by paragraph 4(1)(***c***) of the Department of Fisheries and Oceans Act, the Minister may
> (***a***) collect data for the purpose of understanding oceans and their living resources and ecosystems;
> (***b***) conduct hydrographic and oceanographic surveys of Canadian and other waters;
> (***c***) conduct marine scientific surveys relating to fisheries resources and their supporting habitat and ecosystems;
> (***d***) conduct basic and applied research related to hydrography, oceanography and other marine sciences, including the study of fish and their supporting habitat and ecosystems;
> (***e***) carry out investigations for the purpose of understanding oceans and their living resources and ecosystems;
> (***f***) prepare and publish data, reports, statistics, charts, maps, plans, sections and other documents;
> (***g***) authorize the distribution or sale of data, reports, statistics, charts, maps, plans, sections and other documents;

(***h***) prepare in collaboration with the Minister of Foreign Affairs, publish and authorize the distribution or sale of charts delineating, consistently with the nature and scale of the charts, all or part of the territorial sea of Canada, the contiguous zone of Canada, the exclusive economic zone of Canada and the fishing zones of Canada and adjacent waters;

(***i***) participate in ocean technology development; and

(***j***) conduct studies to obtain traditional ecological knowledge for the purpose of understanding oceans and their living resources and ecosystems.

In 2002, DFO released Canada's Oceans Strategy, which creates a framework that combines the three principles articulated in section 30.[117] While the *Oceans Act* and the *Fisheries Act* complement each other, section 35 of the *Fisheries Act* (the HADD provision) is generally applied to localized works, usually streamside or at the shoreline, which could impact fish habitat. The focus of the *Oceans Act* is on integrated management of marine resources and large-scale conservation measures such as marine protected areas.[118]

The *Species at Risk Act*

Under the *Species at Risk Act* (SARA), the minister of fisheries and oceans is the competent minister for listed aquatic species other than those in lands administered by Parks Canada.[119] The department's role includes consideration of listed aquatic species at risk and their habitats in regulatory reviews and environmental assessments, as well as providing advice on recovery strategies and action plans. Currently, no sockeye salmon population or population grouping is listed as a species at risk under SARA. (For a discussion of SARA and Fraser River sockeye, see Chapter 11, Cultus Lake.)

SARA expressly recognizes that "wildlife, in all its forms, has value in and of itself and is valued by Canadians for aesthetic, cultural, spiritual, recreational, educational, historical, economic, medical, ecological, and scientific reasons."[120] The purposes of SARA are "to prevent wildlife [including aquatic] species from being extirpated or becoming extinct, to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity and to manage species of special concern to prevent them from becoming endangered or threatened."[121] SARA recognizes Canada's commitment to biodiversity and the precautionary principle, both in the preamble and in reference to carrying out a recovery strategy, action plan, or management plan.[122]

DFO is one of three federal government departments or agencies charged with SARA's implementation[123] (the others being Environment Canada and Parks Canada*). It is responsible for protecting aquatic species at risk (other than individuals in or on federal lands administered by Parks Canada) and their critical habitat on federal lands. DFO's area of responsibility includes the legal requirements to enforce automatic prohibitions; to develop recovery strategies, management plans, and action plans within specified timelines; to identify and protect the critical habitat of listed endangered or threatened species, and of listed extirpated species, if a recovery strategy has recommended their reintroduction; and to satisfy co-operation and consultation requirements.[124]

The *Canadian Environmental Assessment Act*

Section 5 of the *Canadian Environmental Assessment Act* (CEAA) requires environmental assessment of "projects" (undertakings related to physical works, or activities prescribed by the *Inclusion List Regulations*[125]) if a "federal authority" is the project proponent, provides financial assistance, or provides federal lands for the project.†

* Note that the Parks Canada Agency itself currently falls under the responsibility of the Department of the Environment; see *Parks Canada Agency Act*, SC 1998, c. 31, s. 2.

† I note that Part 3, Division 1, of Bill C-38, *Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*, which received royal assent on June 29, 2012, repeals the *Canadian Environmental Assessment Act* and replaces it with the *Canadian Environmental Assessment Act, 2012*. As a result, the references in this chapter to the CEAA may not reflect the current law in Canada. Bill C-38 is discussed in detail in Volume 3, Chapter 3, Legislative amendments.

Some decisions made under other acts or regulations will also trigger environmental assessment as described in the *Law List Regulations*.[126] Part VII (Fisheries) of the *Inclusion List Regulations* mandates that there be an environmental assessment of activities requiring authorization under sections 32, 35, or 36 of the *Fisheries Act* (that is, activities that destroy fish by means other than fishing; that harmfully alter, disrupt, or destroy fish habitat; or that result in the deposit of deleterious substances in water frequented by fish). If no federal authority exercises a power, duty, or function listed in section 5 of the CEAA, environmental assessment can still be triggered if the project may cause significant adverse environmental effects in another province, outside Canada, in a national park or park reserve, on lands with various First Nations interests, or on federal lands.

By virtue of section 7 of the CEAA, an environmental assessment of a project is not required where the project is described in an exclusion list[127] or falls under circumstances described in section 7.

The *Canadian Environmental Protection Act*

The *Canadian Environmental Protection Act* (CEPA) contains a commitment to the precautionary principle. CEPA aims to protect the environment and human health by managing marine pollution, disposal at sea, toxic substances, and other sources of pollution. CEPA contains provisions about international water pollution and enables the federal government to take action in instances where a province fails to address a problem. In the case of environmental emergencies, if no other federal or provincial regulations exist, the provisions of CEPA govern. Under CEPA, after consultation with any other affected minister, the minister of the environment has the authority to issue environmental objectives, guidelines, and codes of practice to prevent and reduce land-based sources of marine pollution.*

Section 21 empowers Environment Canada to issue environmental objectives and to release guidelines and codes of practice to prevent and reduce marine pollution from land-based sources. Section 127 enables Environment Canada to issue permits authorizing disposal of waste or other matter, subject to section 129 (any conditions that the minister considers necessary for the protection of marine life). Section 131 provides that persons disposing of substances under a permit, or on an emergency basis pursuant to section 130, are not subject to section 36(3) of the *Fisheries Act* (deposit of deleterious substance). Permits for disposal of fish wastes are required for aquaculture.

A range of tools are available for managing the risks associated with toxic substances under CEPA including regulations, codes of practice and guidelines, pollution prevention plans, and environmental emergency plans.

Under Part 3, the minister has established and must maintain the National Pollutant Release Inventory (NPRI).[128] The NPRI provides facility-specific information on the release, disposal, and recycling of over 300 substances, including toxic substances.[129] Industrial and commercial facilities that meet the NPRI reporting criteria must report information about pollutant releases to Environment Canada annually.[130] Section 44 is the key legislative provision for the regulation of contaminants. It directs Environment Canada to monitor environmental quality, and to conduct research and studies relating to pollution and contamination.

Part 4 of CEPA sets out provisions enabling the minister to require pollution prevention planning, so as to minimize or avoid the creation of pollutants. Pollution prevention planning allows facilities, businesses, or industries to select specific measures for meeting objectives established under CEPA.[131]

Toxic substances under CEPA are listed in Schedule 1. A substance is considered to pose unacceptable risks – and consequently may be added to Schedule 1 – if it meets any of the following criteria (set out in section 64):

- it has or may have an immediate or long-term adverse impact on the environment;
- it poses or may pose a danger to the environment on which life depends; or
- it is or may be harmful to human life or health.

* In 1987, the Canadian Council of Resource and Environment Ministers, now the Canadian Council of Ministers of the Environment, released the *Canadian Water Quality Guidelines*, which included guidelines for the protection of freshwater life. Since their release, science-based guideline derivation procedures have been established and approved nationally for specific media and resource uses (PPR 15, Effluents, p. 17).

The minister may require any person using and/or releasing a Schedule 1 toxic substance to prepare and implement a pollution prevention plan (subsection 56(1)).

Part 5 of CEPA governs the assessment of substances to determine which are toxic and to manage them accordingly. Part 7 of CEPA provides pollution control powers for nutrients and for the protection of the marine environment from land-based sources of pollution. "Land-based sources" are defined under CEPA as "point and diffuse sources on land from which substances or energy reach the sea by water, through the air or directly from the coast."[132] "Marine pollution" means "the introduction by humans, directly or indirectly, of substances or energy into the sea that results, or is likely to result, in (*a*) hazards to human health; (*b*) harm to living resources or marine ecosystems; (*c*) damage to amenities; or (*d*) interference with other legitimate uses of the sea."[133] CEPA grants the minister power to issue environmental objectives, codes of practice, and guidelines specifically for the prevention and reduction of marine pollution from land-based sources.[134]

Part 8 of CEPA provides that where no government regulations exist, the ministers of the environment and of health have the authority to require emergency plans for those substances* that they have declared toxic.[135]

Additional federal legislation relevant to the regulation of the fishery

Section 5(1) of the *Navigable Waters Protection Act* (NWPA) provides that no work "shall be built or placed in, on, over, through or across any navigable water" without authorization. Prior to amendment of the NWPA in 2009, this requirement for authorization was contained in subsection 5(1)(*a*), a subsection that no longer exists. While the *Law List Regulations* prescribe that an authorization under the former subsection 5(1)(*a*) of the NWPA triggers an environmental assessment under the CEAA, the *Law List Regulations* have not been updated to reflect the change in the relevant section of the NWPA. The NWPA is administered by the federal Department of Transport, and not by DFO.

The *Canada Water Act* provides for the co-operative management of water quality and water resource planning in Canada. Where an agreement cannot be reached with a province, the Act permits unilateral action by Canada with respect to federal waters or other waters of "significant national interest," or where water quality has become a matter of "urgent national concern" (section 11).†

Part I of the *Canada Water Act* authorizes the minister of the environment to establish consultative arrangements and enter agreements with the provinces for water resource management.[136] The minister of the environment may enter into intergovernmental arrangements to establish bodies to consult on water resource matters and to advise on and facilitate the coordination or implementation of water priorities, policies, and programs.[137] Part II of the *Canada Water Act* deals with water quality management.‡ It allows the minister to work in co-operation with provinces in water quality management of federal or inter-jurisdictional waters§ where the water quality has become a matter of "urgent national concern."[138] Such co-operative agreements shall designate the waters to which they relate as a "water quality management area."[139]

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* "Substance" refers to a substance on a list established under the regulations or interim orders made under this part of CEPA (*Environmental Emergency Regulations*, SOR/2003-307, s. 193).

† *Canada Water Act*, ss. 5, 6, 11, and 13. "Water resource management" means "the conservation, development and utilization of water resources and includes, with respect thereto, research, data collection and the maintaining of inventories, planning and the implementation of plans, and the control and regulation of water quantity and quality" (*Canada Water Act*, s. 2(1)).

‡ "Water quality management" means "any aspect of water resource management that relates to restoring, maintaining or improving the quality of water" (s. 2(1)).

§ *Canada Water Act* (s. 2(1)) defines "[f]ederal waters" as, "other than in Yukon, waters under the exclusive legislative jurisdiction of Parliament and, in Yukon, waters in a federal conservation area within the meaning of section 2 of the *Yukon Act*"; and "[i]nter-jurisdictional waters" means "any waters, whether international, boundary or otherwise, that, whether wholly situated in a province or not, significantly affect the quantity or quality of waters outside the province."

The Canadian Food Inspection Agency (CFIA), under the minister of agriculture and agri-food, administers the *Health of Animals Act*, which was amended to include aquatic animals, like salmon, in December 2010. Under this Act, "disease" includes "(a) a reportable disease and any other disease that may affect an animal or that may be transmitted by an animal to a person, and (b) the causative agent of any such disease."[140] Reportable diseases are "diseases that are of significant importance to animal health and to the Canadian economy."[141] Reportable diseases are set out in the *Reportable Diseases Regulations*, which came into force in January 2011.[142] The *Reportable Diseases Regulations* list several salmon diseases. (The *Health of Animals Act* and its related regulations are discussed further in Chapter 9, Fish health management.)

Regulation of the fishery by other federal departments

Other federal departments have additional legislative mandates to regulate areas that affect the fishery. Transport Canada oversees marine infrastructure for pleasure craft, small vessels, and large commercial vessels, as well as transport of dangerous goods by water. Transport Canada also has jurisdiction over aquaculture to the extent that it may issue navigable water permits to salmon farms.[143] In doing so, it may conduct reviews under the *Canadian Environmental Assessment Act.*[144] The *Navigable Waters Protection Act* allows for the removal of obstructions from navigable water and requires approvals for planned obstructions.[145]

Transport Canada and the National Energy Board regulate various aspects of linear development (for example, road and rail networks, bridges, electrical transmission lines, and seismic and interprovincial oil and gas lines).[146] Linear development projects are also assessed by DFO under its *Fisheries Act*, section 35, authority.

As noted above, the CFIA is responsible for administration of the *Health of Animals Act*, its related regulations, and the *Feeds Act*.[147] The CFIA co-administers the National Aquatic Animal Health Program with DFO.

Bill C-38

I note that Part 3 of Bill C-38, *An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*, which received royal assent on June 29, 2012 enacts in Part 3, Division 1, a new *Canadian Environmental Assessment Act, 2012* (CEAA, 2012), which repeals the *Canadian Environmental Assessment Act* in force at the time of the hearings and report writing. Bill C-38 also makes a number of amendments to the *Fisheries Act*.

Although the evidence I received was in the context of the regulatory scheme in place at the time of the hearings, a number of the amendments likely change the way the federal government, and DFO and Environment Canada in particular, manage environmental assessments and fish habitat. In Volume 3, Chapter 3, Legislative amendments, I summarize these changes and address the possible implications of these amendments in light of this Commission's evidence and my findings and recommendations.

Provincial legislation and local government laws

While the lead role in managing the Fraser River sockeye fishery belongs to the federal government, by virtue of section 92 of the Constitution, the province has jurisdiction over "property and civil rights" and the "management of public lands" in the province. The following are provincial statutes that relate to the Fraser River sockeye salmon fishery:

BC *Fisheries Act*, RSBC 1996, c. 149
BC *Water Act,* RSBC 1996, c. 483
BC *Wildlife Act*, RSBC 1996, c. 488
BC *Forest and Range Practices Act*, SBC 2002, c. 69
BC *Environmental Management Act*, SBC 2003, c. 53
BC *Fish Protection Act*, SBC 1997, c. 21
BC *Fish Inspection Act*, RSBC 1996, c. 148
BC *Environmental Assessment Act*, SBC 2002, c. 43

The BC *Fisheries Act* provides for the licensing and regulatory control of activities associated with commercial fisheries, including licensing of

commercial fishers, fish processing plants, and fish buying stations, as well as the licensing of recreational fishers. Section 8 of the provincial *Fisheries Act* mandates that a person must not fish or attempt to fish "unless the person holds a valid licence issued for that purpose and has paid the fee prescribed." While subsection 26(2)(*a*) of this Act authorizes the Lieutenant Governor in Council to make regulations for "safe and orderly aquaculture," the BC Supreme Court held this section to be outside the province's jurisdiction insofar as it applies to finfish aquaculture.[148] This court decision is discussed further in Chapter 8, Salmon farm management.

The BC *Water Act* is the primary statute for managing works in and about a body of water and the diversion of water. It vests in the government of British Columbia the right to use and regulate flow of all stream water except where private rights have been established.[149] The *Water Regulation* sets out works that may be permitted under the *Water Act*'s notification process, including restoration and maintenance of fish habitat.[150] (For further detail about the *Water Act*, see Chapter 6, Habitat management.)

The BC *Wildlife Act* governs the interaction of people and provincially managed wildlife, which includes fish, and also provides in section 12 that a person must hold a valid licence in order to fish in non-tidal waters. The *Forest and Range Practices Act* regulates forestry practices impacting the Fraser River sockeye salmon habitat. (For further detail about the *Forest and Range Practices Act*, see Chapter 6, Habitat management.)

The BC *Environmental Management Act* (EMA) provides the BC Ministry of Environment with the authority to manage, protect, and enhance the environment. The *Waste Discharge Regulation*, made under the EMA, prescribes entities that require authorization before discharging waste into the environment.[151] (For further detail about the *Environmental Management Act*, see Chapter 6, Habitat management.)

The BC *Fish Protection Act* (FPA), allows for sensitive stream designation to protect a population of fish whose sustainability is at risk because of inadequate water flow within a stream or habitat degradation.[152] The FPA prohibits the construction of bank-to-bank dams on designated "protected rivers," including the Fraser River.[153] Designated sensitive streams are subject to recovery plans and, for these streams, the effects of any development on fish and fish habitat are considered in water licensing decisions.[154] The FPA also provides authority to issue temporary orders to protect stream flow levels in times of drought.[155]

The FPA also empowers the Lieutenant Governor in Council to establish regulations to set out policy directives regarding protection and enhancement of riparian areas.[156] These regulations may be established after consultation with representatives of the Union of British Columbia Municipalities (UBCM). (For further detail about the *Riparian Areas Regulation*, see below).

The BC *Fish Inspection Act* provides the authority to regulate activities concerning the handling, processing, storing, grading, packaging, marking, transporting, marketing, and inspection of fish and fish products. The *Fish Inspection Regulations* are intended to ensure that fish processed and sold within the province have met specified requirements.[157]

The BC *Environmental Assessment Act* applies to some projects including mine, energy, water management, waste disposal, food processing, transportation, and tourist resorts.

As previously noted, the federal government became responsible for aquaculture operations in and around the waters and coast of British Columbia in 2010. The province remains responsible for issuing tenures related to aquaculture. The Government of Canada passed the *Pacific Aquaculture Regulations* in 2010, and entered into an agreement with the province entitled the Canada–British Columbia Agreement on Aquaculture Management.[158] This agreement sets out areas of federal and provincial responsibility. The agreement provides that "Canada may issue aquaculture licences under the *Fisheries Act* for all aquaculture activities to be undertaken in the province of British Columbia" and that "British Columbia may issue land tenures under the *Land Act* for aquaculture purposes."[159] It provides for the sharing of information; collaboration on public reporting; and coordination of inspections, compliance, and enforcement activities.[160] It also provides that DFO is the lead federal agency for the management of aquaculture in British Columbia, while the provincial Ministry of Agriculture will "represent a provincial view on such matters in

dealing with Canada."[161] Further, it states that the parties will establish a management committee to oversee implementation of the 2010 agreement.[162] (For further detail about federal and provincial responsibility for regulation of aquaculture, see Chapter 8, Salmon farm management.)

Municipal land use planning and bylaws

The BC Legislature has delegated authority over land use planning and zoning to local governments.[163] The *Riparian Areas Regulation* (RAR) was enacted under subsection 12(1) of the provincial *Fish Protection Act*. The RAR provides local governments with direction to improve the protection of fish and fish habitat in British Columbia.[164] The purpose of the RAR is to "establish directives to protect riparian areas from development so that the areas can provide natural features, functions and conditions that support fish and life processes,"[165] and to facilitate co-operation between DFO, the provincial Ministry of Environment (MOE), and the UBCM.[166]

DFO, MOE, and UBCM have entered into the Intergovernmental Cooperation Agreement Respecting the Implementation of British Columbia's Riparian Areas Regulation (RAR Agreement).[167] The purpose of the RAR Agreement is to define the roles and responsibilities of the three govenmental bodies and create a management structure to oversee the implementation and ongoing delivery of the RAR.[168] The RAR Agreement also established a tripartite steering committee.[169]

The RAR applies to municipalities and regional districts in the Lower Mainland, on much of Vancouver Island, in the Islands Trust area, and in parts of the Southern Interior. Adoption is voluntary for local governments not covered by the regulation.[170] Where it applies, the RAR covers all streams, rivers, creeks, ditches, ponds, lakes, springs, and wetlands that are connected (above ground) to a body of water that provides fish habitat; the RAR does not apply to marine or estuarine areas.[171]

The RAR applies to new residential, commercial, and industrial development on land under local government jurisdiction, which includes private land and the private use of provincial Crown land.[172] Under the RAR, development is defined as:

> any of the following associated with or resulting from the local government regulation or approval of residential, commercial or industrial activities or ancillary activities to the extent that they are subject to local government powers under Part 26 of the *Local Government Act:*
>
> (a) Removal, alteration, disruption, or destruction of vegetation;
> (b) Disturbance of soils;
> (c) Construction or erection of buildings and structures;
> (d) Creation of non-structural impervious or semi-impervious surfaces;
> (e) Flood protection works;
> (f) Construction of roads, trails, docks, wharves, and bridges;
> (g) Provision and maintenance of sewer and water services;
> (h) Development of drainage systems;
> (i) Development of utility corridors; and
> (j) Subdivision as defined in section 872 of the *Local Government Act*.[173]

The RAR does not apply to development or development variance permits issued to enable reconstruction or repair of permanent structures described in subsection 911(8) of the *Local Government Act,* if the structure remains on its existing foundation.[174] It also does not apply to agriculture and mining activities, hydroelectric facilities, forestry, federal, and First Nations reserve lands, parks and parkland, and institutional developments.[175] Nor does it apply to existing permanent structures, roads, and other development within the riparian protection area or developments that were approved before the RAR was enabled.[176]

Local governments can implement the RAR by adding a requirement to produce a qualified environmental professional (QEP) assessment report to existing development permit and approval processes.[177] Alternatively, a local government can incorporate a level of protection consistent with the RAR into their zoning and general bylaws.[178] Regardless of the tool employed by local government, the regulatory process must include a definition of streams and riparian areas consistent with the RAR, a means to trigger regulatory action for development activities proposed within riparian assessment areas, and a means of requiring a QEP

assessment report that complies with the RAR and the RAR assessment methods.[179] In areas of British Columbia where the RAR is not in effect, DFO's habitat referral process is used.[180] (For a description of the habitat referral process, see the DFO, Environment Canada, and provincial policies and practices section of Chapter 6, Habitat management, which provides more detail on the RAR and its implications for freshwater habitat management.)

International law

This section summarizes international law directly related to the conservation and management of Fraser River sockeye salmon.* As a member of a broader international community, Canada has in recent decades made certain commitments toward sustainable fisheries and environmental protections. These commitments are relevant to Canada's domestic management of the Fraser River sockeye salmon fishery. In addition, as described further in Volume 2 of this Report, Fraser River sockeye salmon spend a considerable portion of their lives in the North Pacific Ocean beyond Canadian waters, thus requiring international co-operation in this area.

International agreements

Canada has entered into a number of international agreements relevant to the management and conservation of Fraser River sockeye salmon. These agreements recognize Canada's interests in Fraser River sockeye and also set out certain of its obligations with respect to harvest management, habitat protection, scientific research, and other matters.

United Nations Convention on the Law of the Sea

Canada signed the *United Nations Convention on the Law of the Sea* (UNCLOS) in December 1982 and ratified it in November 2003.[181] The UNCLOS is a foundational treaty that provides a framework for the international law of the sea. Among other things, the UNCLOS governs fisheries and the protection of the marine environment. It mandates that the country in which an anadromous fish species originates has the primary interest in and responsibility for that species.[182] Canada has the primary interest in and responsibility for Fraser River sockeye salmon.[183]

The UNCLOS is relevant to the management and conservation of Fraser River sockeye in several ways. This convention confirms the existence of different marine zones under international law (internal waters, territorial seas, the exclusive economic zone, and the high seas) and sets out certain rules governing fisheries in these marine areas.[184] For example, the UNCLOS prohibits fishing for salmon on the high seas.[185] The UNCLOS also establishes a framework for marine environmental protection, including Canada's obligation to prevent, reduce, and control marine pollution from all sources; avoid polluting the environment of other countries; and protect rare or fragile ecosystems and the habitat of threatened or endangered species.[186] The UNCLOS also sets out a framework for marine scientific research,[187] including Canada's obligation to promote and facilitate the development and conduct of marine scientific research.[188]

Regional fishing agreements or other multi-party agreements must be developed and interpreted in a manner consistent with the UNCLOS.[189]

Pacific Salmon Treaty

In 1937, Canada and the United States ratified the *Convention for the Protection, Preservation and Extension of the Sockeye Salmon Fisheries of the Fraser River System* (1937 Convention).[190] This convention established the International Pacific Salmon Fisheries Commission and provided for the management of the Fraser River fishery within a defined area of the Pacific Coast, called the Convention Area.[191]

In March 1985, Canada and the United States ratified *An Agreement between the Government of*

* In its final submission, Canada sought an explicit statement that this description of international law does not constitute an expression of the Government of Canada's position on international law. In my view, the status of this Commission as independent of the Government of Canada makes such a statement unnecessary, as it is obvious that I have no mandate to speak on behalf of the Government of Canada.

Canada and the Government of the U.S.A. concerning Pacific Salmon (Pacific Salmon Treaty).[192] The Pacific Salmon Treaty replaces the 1937 Convention and provides for bilateral management of salmon originating in the waters of one country and which are subject to interception by the other country, or affect management of the other country's salmon, or affect biologically the stocks of the other country.[193]

Article 3 of the Pacific Salmon Treaty articulates the following principles:

1. With respect to stocks subject to this Treaty, each Party shall conduct its fisheries and its salmon enhancement programs so as to:
   (a) prevent overfishing and provide for optimum production; and
   (b) provide for each Party to receive benefits equivalent to the production of salmon originating in its waters
2. In fulfilling their obligations pursuant to paragraph 1, the Parties shall cooperate in management, research and enhancement.
3. In fulfilling their obligations pursuant to paragraph 1, the Parties shall take into account:
   (a) the desirability in most cases of reducing interceptions; and
   (b) the desirability in most cases of avoiding undue disruption of existing fisheries; and
   (c) annual variations in abundance of the stocks.

The Pacific Salmon Treaty creates the Pacific Salmon Commission (PSC) to replace the International Pacific Salmon Fisheries Commission.[194] The PSC consists of no more than eight commissioners, four appointed by each party.[195] Each party may also appoint four alternate commissioners.[196] The PSC is mandated to establish "panels" as specified in Annex I of the Pacific Salmon Treaty. They include the Fraser River Panel on Fraser River sockeye and pink salmon harvested in the Fraser Panel Area[197] (formerly the Convention Area under the 1937 Convention).[198] During the fishing season, the Fraser River Panel may make orders for the adjustment of fishing times and areas, and the parties must give effect to these orders in accordance with their respective laws and procedures.[199] Annex IV, Chapter 4, of the Pacific Salmon Treaty also sets out a term-limited management plan for Fraser River sockeye and pink salmon.[200]

Other obligations on DFO established by the Pacific Salmon Treaty include submitting an annual report of fishing activities to the other party and to the PSC.[201] Parties are also required to submit preliminary information for the ensuing year, such as the estimated run size, the interrelationship between stocks, the spawning escapement required, the estimated total allowable catch, and the party's fisheries management intentions and domestic allocation objectives.[202]

The Pacific Salmon Treaty and Pacific Salmon Commission, particularly in respect of management of Fraser River sockeye, are discussed in greater detail in Chapter 5, Sockeye fishery management.

Convention on the Conservation of Anadromous Stocks of the North Pacific Ocean

Canada adopted the *Convention on the Conservation of Anadromous Stocks of the North Pacific Ocean* (North Pacific Anadromous Stocks Convention)[203] in February 1992, and it came into force in February 1993. Parties to this convention are Canada, the United States, Japan, South Korea, and Russia. China participates informally in this convention but is not a party to it.[204]

The North Pacific Anadromous Stocks Convention prohibits directed fishing for anadromous fish stocks, such as Fraser River sockeye, within a "Convention Area" consisting of the waters of the North Pacific Ocean and its adjacent seas.* According to this convention, the incidental catch of anadromous fish in the Convention Area must be minimized, and such incidental catch must be immediately returned to the sea.[205] Importantly, this convention sets out an enforcement scheme applicable to fishing in the Convention Area.[206] It also establishes the

* Specifically, the North Pacific Ocean and its adjacent seas north of latitude 33° north and beyond the exclusive economic zones of the parties (North Pacific Anadromous Stocks Convention, Articles I and III).

North Pacific Anadromous Fish Commission, an international organization established to promote the conservation of anadromous stocks in the Convention Area[207] by, among other things, evaluating enforcement actions taken by the parties, recommending scientific research activities, and promoting information exchange.[208]

Convention for a North Pacific Marine Science Organization

Canada adopted the *Convention for a North Pacific Marine Science Organization* in December 1990 and ratified it in October 1991.[209] Parties to this convention are Canada, the United States, South Korea, Russia, Japan, and China.[210]

This convention establishes an intergovernmental organization, the North Pacific Marine Science Organization, commonly referred to as PICES.[211] PICES is mandated to promote and coordinate marine scientific research and information-sharing related to the North Pacific Ocean,* including research on the ocean environment; global weather and climate change; ocean flora, fauna, and ecosystems; and effects of human activities.[212]

FAO Compliance Agreement

Canada accepted the United Nations Food and Agricultural Organization's *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas* (FAO Compliance Agreement) in May 1994.[213] The agreement came into force in April 2003.

The FAO Compliance Agreement recognizes the duty of states, under international law and the UNCLOS, to take measures as necessary for the conservation of living resources in the high seas, and it seeks to address compliance with international conservation and management measures.[214] This agreement applies to all fishing vessels that are used or intended for fishing on the high seas.[215] Among other things, the FAO Compliance Agreement requires each party to "take such measures as may be necessary to ensure that fishing vessels entitled to fly its flag do not engage in any activity that undermines the effectiveness of international conservation and management measures."[216]

Convention on Biological Diversity

Canada signed the *Convention on Biological Diversity* in June 1992 and ratified it that December.[217] This convention recognizes "the intrinsic value of biological diversity and of the ecological, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components" and notes that "it is vital to anticipate, prevent and attack the causes of significant reduction or loss of biological diversity at source."[218]

The *Convention on Biological Diversity* has, as objectives, the conservation of biological diversity, the sustainable use of biodiversity's components, and the fair and equitable sharing of the benefits arising from the utilization of genetic resources.[219] Biodiversity is defined as "the variability among living organisms from all sources" including terrestrial, marine, and other aquatic ecosystems and the ecological complexes of which they are part.[220] This includes diversity within species, between species, and of ecosystems.[221]

This convention places obligations on Canada relevant to the management and conservation of Fraser River sockeye. For example, Article 7 states that each party, including Canada, "shall as far as possible and as appropriate" identify and monitor components of biological diversity important for conservation and sustainable use and to identify processes or activities which have or are likely to have significant adverse impacts on biological diversity.[222] The data derived from this identification and monitoring process must be maintained and organized.[223] Article 8 focuses on in situ conservation, meaning the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings.[224] Article 8 states that each party shall, among other things, and as far as possible and as appropriate, establish protected areas, regulate and manage biological resources important for the conservation of biological diversity, promote the protection of ecosystems and the maintenance of viable populations of species in natural

* Specifically with respect to the temperate and subarctic region of the North Pacific Ocean and its adjacent seas, especially northward from 30° north latitude (Article II, CNPMSO).

surroundings, rehabilitate and restore degraded ecosystems, and promote the recovery of threatened species.[225] Further, parties must promote and encourage research that contributes to the conservation and sustainable use of biological diversity.[226]

The preamble of the *Convention on Biological Diversity* also incorporates the precautionary principle, discussed below.[227]

Other international fisheries instruments

In 1995, the 28th session of the UN Food and Agricultural Organization Conference adopted the *Code of Conduct for Responsible Fisheries* (FAO Code of Conduct).[228] Canada supported its adoption.[229] As stated in Article 1 of the FAO Code of Conduct, it is a voluntary code. However, some of its provisions are also found in international agreements such as the UNCLOS and the FAO Compliance Agreement, discussed above.[230]

The FAO Code of Conduct provides principles and standards applicable to the conservation, management, and development of all fisheries, including the capture, processing, and trade of fish and fishery products, fishery operations, aquaculture, fisheries research, and the integration of fisheries into coastal area management.[231] The objectives of the code include, among other things, establishing principles for responsible fishing, serving as a reference document for improving the legal framework for responsible fisheries, and providing standards of conduct for fishers.[232]

General principles set out in the FAO Code of Conduct include the following:

- states should conserve aquatic ecosystems;
- fisheries management should promote the quality, diversity, and availability of fishery resources;
- states should prevent overfishing;
- fisheries management decisions should be based on the best scientific evidence available (taking into account traditional knowledge); and
- states and fisheries organizations should take into account the precautionary approach.[233]

The code also states that all critical fisheries habitats in marine and freshwater ecosystems should be protected and rehabilitated as far as possible and where necessary.[234]

The precautionary principle

The precautionary principle, sometimes referred to as the precautionary approach, appears in the United Nations Conference on Environment and Development's 1992 *Rio Declaration on Environment and Development* (Rio Declaration):

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[235]

Following the Rio Declaration, articulations of the precautionary principle have appeared in international agreements to which Canada is a party. The *Convention on Biological Diversity* notes in its preamble that, "where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat."[236] In *Environmental Defence Canada v. Canada (Minister of Fisheries and Oceans)* the Federal Court noted that, having ratified the *Convention on Biological Diversity*, Canada "is committed to apply its principles," and "an important feature of the *Convention* is the 'precautionary principle.'"[237]

The precautionary principle is also found in the 1995 *United Nations Agreement Relating to the Conservation and Management of Straddling Fish Stocks and Migratory Fish Stocks* (UNFA).[238] The UNFA came into force in November 2001 and Canada is a party.[239] Although the UNFA does not apply to anadromous fish stocks, such as Fraser River sockeye,* it provides an example of the precautionary principle in another fisheries context:

* The UNFA applies to straddling fish stocks and highly migratory fish stocks as interpreted in the context of the UNCLOS (PPR 2, International Law, p. 45).

> States shall apply the precautionary approach widely to conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks in order to protect the living marine resources and preserve the marine environment.
>
> States shall be more cautious when information is uncertain, unreliable or inadequate. The absence of scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.[240]

In 2001, the Supreme Court of Canada observed that "scholars have documented the precautionary principle's inclusion 'in virtually every recently adopted treaty and policy document related to the protection and preservation of the environment'" and that "there may be 'currently sufficient state practice to allow a good argument that the precautionary principle is a principle of customary international law.'"[241] Principles of customary international law are a source of international law that can create state obligations outside treaties.[242] Canada's position in this Inquiry is that the precautionary principle is not an established principle of customary international law.[243]

Whether it is or is not a principle of customary international law, Canada has expressed its commitment to the precautionary principle in several pieces of domestic legislation* relevant to the management and conservation of Fraser River sockeye. These include the *Oceans Act*, the *Canadian Environmental Protection Act*, the *Canadian Environmental Assessment Act*, and the *Species at Risk Act*.[244] Canada has also incorporated the precautionary principle (or precautionary approach) into various relevant policies, action plans, and strategies, including the Wild Salmon Policy, the 2002 Aquaculture Policy Framework, DFO's *2005–10 Strategic Plan: Our Waters, Our Future*, the Federal Sustainable Development Strategy, Canada's Framework for Science and Technology Advice, the 2005 Oceans Action Plan, and the Sustainable Fisheries Framework, among others.[245] I am satisfied that the precautionary principle serves as an important guide in my consideration of the management and conservation of Fraser River sockeye.

Notes

1 Policy and practice reports were prepared by Commission counsel and entered into evidence to provide a contextual background to inform the hearings on the various topics, including: PPR 1, Aboriginal and Treaty Rights; PPR 2, International Law; PPR 3, Legislative Framework; and PPR 4, Pacific Salmon Treaty.
2 *Reference re British North America Act*, 1867, s. 108 (Can), [1898] JCJ 1.
3 British Columbia Terms of Union, RSC 1985, App. II, No. 10.
4 *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 SCR 12, para. 37.
5 *Constitution Act, 1867*, para. 11.
6 *Ward v. Canada (Attorney General)*, [2002] 1 SCR 569, para. 34.
7 *R. v. Nikal*, [1996] 1 SCR 1013, para. 102.
8 *R. v. Marshall*, [1999] 3 SCR 533, para. 40.
9 *R. v. Sparrow*, [1990] 1 SCR 1075, para. 81.
10 *R. v. Gladstone*, [1996] 2 SCR 723, para. 65.
11 *The Queen v. Robertson*, [1882], 6 SCR 52, paras. 120–21.
12 *Interprovincial Co-Operatives Ltd. v. The Queen*, [1976] 1 SCR 477, p. 495.
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16 *R. v. Sparrow*, [1990] 1 SCR 1075, para. 78.
17 Exhibit 1135.
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19 Douglas Harris, Transcript, June 27, 2011, pp. 3–4.
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21 Exhibit 1135, pp. 11–12, 16.
22 Exhibit 1135, pp. 16–18.
23 Transcript, June 27, 2011, pp. 55, 61.
24 Exhibit 1135, pp. 4–8.
25 Exhibit 1135, p. 4.
26 Exhibit 1135, p. 4.
27 Transcript, June 27, 2011, p. 23.
28 Douglas Harris, Transcript, June 27, 2011, pp. 9, 15, 23.
29 Exhibit 1135, p. 25.
30 Exhibit 1135, p. 26.
31 Transcript, June 27, p. 115.
32 First Nations Coalition's written submission, p. 7, available at www.cohencommission.ca.
33 *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, para. 72.
34 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.
35 *R. v. Van der Peet*, [1996] 2 SCR 507, para. 30.
36 *R. v. Sappier; R. v. Gray*, [2006] 2 SCR 686, 2006 SCC 54, paras. 26, 33.

* Note the Supreme Court of Canada also observed that the precautionary principle had been "codified in several items of domestic legislation" (*114957 Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, para. 31).

37 *R. v. Gladstone*, [1996] 2 SCR 723, para. 65.
38 *R. v. Van der Peet*, [1996] 2 SCR 507, para. 46.
39 *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, para. 12.
40 *R. v. Sappier; R. v. Gray*, [2006] 2 SCR 686, 2006 SCC 54, para. 21.
41 *R. v. Sappier; R. v. Gray*, [2006] 2 SCR 686, 2006 SCC 54, para. 37; see also *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2009 BCSC 1494, para. 482.
42 *R. v. Sappier; R. v. Gray*, [2006] 2 SCR 686, 2006 SCC 54, paras. 50–51.
43 *R. v. Van der Peet*, [1996] 2 SCR 507, para. 55.
44 *R. v. Sappier; R. v. Gray*, [2006] 2 SCR 686, 2006 SCC 54, paras. 39–40.
45 *R. v. Van der Peet*, [1996] 2 SCR 507, para. 70.
46 *R. v. Van der Peet*, [1996] 2 SCR 507, paras. 49, 74.
47 *R. v. Sappier; R. v. Gray*, [2006] 2 SCR 686, 2006 SCC 54, para. 45.
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50 *R. v. Sappier; R. v. Gray*, [2006] 2 SCR 686, 2006 SCC 54, para. 26.
51 *R. v. Sappier; R. v. Gray*, [2006] 2 SCR 686, 2006 SCC 54, para. 26.
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54 *Mitchell v. M.N.R.*, [2001] 1 SCR 911, para. 133.
55 *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, para. 1.
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57 *R. v. Sparrow*, [1990] 1 SCR 1075, para. 78.
58 *R. v. Sparrow*, [1990] 1 SCR 1075, para. 78.
59 *R. v. Sparrow*, [1990] 1 SCR 1075, para. 81.
60 *R. v. Quipp*, 2011 BCCA 235, para. 47.
61 *R. v. Sparrow*, [1990] 1 SCR 1075, para. 69.
62 First Nations Coalition's final written submissions, pp. 12–13, available at www.cohencommission.ca.
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64 *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2011 BCCA 237, para. 489.
65 *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2011 BCCA 237.
66 *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2011 BCCA 23, basis for application for leave to appeal to SCC remanded to BCCA, 34387 (March 29, 2012).
67 *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2011 BCCA 23, basis for application for leave to appeal to SCC remanded to BCCA, 34387 (March 29, 2012).
68 *R. v. Van der Peet*, [1996] 2 SCR 507, para. 91.
69 *R. v. N.T.C. Smokehouse*, [1996] 2 SCR 672, para. 26.
70 *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56.
71 *R. v. Coutlee and McCaleb*, BC Prov. Ct., Kamloops Registry No. 58374-C, May 7, 2004, unreported, para. 114.
72 *R. v. Billy*, 2006 BCPC 48, para. 51.
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76 *R. v. Gladstone*, [1996] 2 SCR 723, para. 75; see also *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, para. 46.
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79 *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511, para. 35; see also *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, paras. 39–50, *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247.
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81 *R. v. Sampson* [1999] 2 CNLR 184, para. 109.
82 *R. v. Jack, John and John* (1995), 16 BCLR (3d) 201 (BCCA), para. 77.
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101 *Canada Marine Act*, SC 1998, c. 10; *Canada Shipping Act*, SC 2001, c. 26; *Canada Water Act*, RSC 1985, c. C-11; *Canadian Environmental Assessment Act*, SC 1992, c. 37; *Canadian Environmental Protection Act*, SC 1999, c. 33; *Coastal Fisheries Protection Act*, RSC 1985, c. C-3; *Department of Fisheries and Oceans Act*, RSC 1985, c. F-15; *Federal Real Property and Federal Immoveables Act*, SC 1991, c. 50; *Fish Inspection Act*, RSC 1985, c. F-12; *Fisheries Act*, RSC 1985, c. F-14; *Fishing and Recreational Harbours Act*, RSC 1985, c. F-24; *Health of Animals Act*, SC 1990, c. 21; *Navigable Waters Protection Act*, RSC 1985, c. N-22; *Oceans Act*, SC 1996, c. 31; and *Species at Risk Act*, SC 2002, c. 29.
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138 *Canada Water Act*, RSC 1985, c. C-11, s. 11.
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145 *Navigable Waters Protection Act*, RSC 1985, c. N-22, s. 5.
146 PPR 14, Freshwater Urbanization, p. 39.
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175 Exhibit 1007, pp. 9–10; Stacey Wilkerson, Transcript, June 8, 2011, pp. 55–56.
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