

**COMMISSION OF
INQUIRY INTO THE DECLINE OF
SOCKEYE SALMON IN THE FRASER RIVER**

**SUBMISSIONS AND RECOMMENDATIONS ON BEHALF OF
THE MÉTIS NATION BRITISH COLUMBIA (the "MNBC")**

Introduction

MNBC will comment on six main areas covered by the evidence called by the Commission:

1. Métis Aboriginal Legal Interests;
2. Department of Fisheries and Oceans ("DFO") Management Agencies, Structures, and Policies;
3. Métis World View and Traditional Knowledge;
4. Fisheries Enforcement and Monitoring;
5. Habitat Management and Enforcement; and,
6. Wild Salmon Policy.

In the course of the Commission hearings, the witnesses have made a significant number of proposed recommendations. MNBC will attempt to incorporate several of the proposed recommendations in the following submissions. However, MNBC recognizes that its standing at the Commission is based upon its members' particular interest in the future sustainability of the Fraser River Sockeye salmon stocks. Until this Commission recognized the standing of MNBC, government agencies have largely ignored the rights of British Columbian Métis to fish in the Fraser River. As a result, a consistent theme in our submissions will focus on the right of the Métis to be consulted by government agencies in the management of the Fraser River fishery.

MNBC is a provincial organization formed in 1996 and is one of five provincial entities that comprise the federal Métis National Council. The structure of MNBC mirrors the structure of the provincial government. MNBC has elected directors who are appointed as Ministers of various government portfolios. MNBC has 7 regional entities that are represented by regional governance councils. MNBC is composed of 35 chartered communities each having an elected president. The structure of MNBC comes from elected regional and provincial officials. Presently, there are 5,800 members of the MNBC and 60,000 people self-identify as Métis in BC.¹

MNBC is thankful to have been a participant in this Commission. MNBC citizens have enjoyed the collateral benefits of a heightened awareness of the issues facing the caretakers of the British Columbia fisheries and, for the purposes of this Commission, the sockeye fishery. This Commission has highlighted many of the issues facing the Fraser River sockeye salmon for many MNBC citizens, especially in the Fraser River watershed who rely on sockeye salmon as a food staple. Many Métis citizens use sockeye in social and ceremonial circumstances in carrying out the traditions and rites of their ancestors. The Commission has also brought awareness to the general public through the media and observer comments.

Métis Aboriginal Legal Interests

MNBC submits that the DFO should consult them on issues related to the Fraser River fishery. Métis Aboriginal rights have been granted constitutional recognition and protection despite the DFO's refusal to consult with MNBC.² In *R. v. Powley*, the Supreme Court of Canada stated that

The inclusion of the Métis in s. 35 represents Canada's commitment to recognize and value the distinctive Métis cultures, which grew up in areas not yet open to

¹ Exhibit 298, "Witness Summary, Captain Ducommun", p. 1. ("Exhibit 298")

² *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 35.

*colonization, and which the framers of the Constitution Act, 1982 recognized can only survive if the Métis are protected along with other Aboriginal communities.*³

Métis communities developed across Canada as exploration and the fur trade moved West. As a result, the Supreme Court of Canada decided that claims for Métis Aboriginal rights should focus on identifying central practices, customs and traditions to the particular Métis community's existence and relationship to the land it is situated in that arose post-European contact but before European political and legal control over that territory.⁴ Further, the honour of the Crown requires that the government ministries consult with Aboriginal groups on potential s. 35 Aboriginal rights, including those of the Métis.⁵ The degree of consultation, and potentially accommodation, depends on the strength of the right to accommodate that right, but this characteristic does not diminish the responsibility of the Crown to consult.⁶ Further, the consultation must be carried out in manner that the consultation may affect decision or the decision-making process. In this respect, MNBC takes the position that the DFO is required to meaningfully consult the Métis if they have a potential right to fish in the Fraser River.

The British Columbian Métis have maintained an ongoing interest in the Fraser River salmon fishery since before European control, as required by *Powley*. Métis inhabitants were documented as residing in British Columbia dating back to 1793.⁷ Although the Métis are a mobile people, there are communities of Métis throughout British Columbia generally located in the river valleys of the Lower Mainland, Kamloops, Williams Lake, and Fort St. James.⁸ These Métis communities were not much different than the communities, which existed 200 years ago.⁹ The Métis have always been fishermen even if they were remembered prominently as

³ *R. v. Powley*, 2003 SCC 43, para. 17. ("*Powley*")

⁴ *Ibid*, at para. 37; *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

⁵ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.R. 511, para. 25, 39 – 51 ("*Haida*").

⁶ *Ibid*.

⁷ Captain Ducommun, December 15, 2010, p. 44, ll. 44 ("*Ducommun Testimony*").

⁸ Exhibit 298, *supra* note 1, p. 1.

⁹ *Ibid*, p. 1.

buffalo hunters.¹⁰ The Fraser River fishery provided food and a social activity for the Métis. However, social fishing is subdued because of the Métis have not had the opportunity to have their rights proven in court and the resulting DFO's denial to consult with the Métis.

There is a continuity from those early Métis communities to the Métis represented by MNBC today. For the Métis fishing remains an integral activity, if only on a smaller scale than hunting because of the Métis legal position only. Often many Métis individuals will fish in smaller groups or with their First Nations family members to avoid any potential penalties.¹¹ However, the importance of the Fraser River fishery has not diminished as an integral component to the British Columbian Métis identity. In 2006, MNBC estimated that the Métis alone were responsible for the harvesting of 100,000 sockeye salmon.¹² If the Métis were able to resolve their legal position regarding the fishery or the DFO legitimately consulted with the Métis in an AFS Agreement then fishing would again become a large social activity for the Métis, as is now the case with hunting.¹³

Despite the historical connection and the Métis' continuing interest in the Fraser river fishery, the DFO in British Columbia has rejected all of MNBC's requests to consult regarding the Fraser River and Fraser bound sockeye in tidal waters. The DFO will not consult with MNBC until the Métis Aboriginal right to fish in the Fraser River has been proven in court.¹⁴ However, MNBC submits that even if MNBC were consulted, the consultation is not meaningful because the DFO appears to predetermine the appropriate food, social, and ceremonial allocation for an Aboriginal group prior to consulting that group.¹⁵ It is the position of MNBC that this method of consultation is illegal within terms of the Supreme Court of Canada

¹⁰ *Ibid.* See e.g. *Powley*, *supra* note 4, para. 41-43, where the Supreme Court of Canada recognized that fishing was integral to the Métis community at Sault Ste. Marie.

¹¹ Exhibit 298, *supra* note 1, p. 2.

¹² Ducommun Testimony, *supra* note 6, p. 49, ll. 9.

¹³ Exhibit 298, *supra* note 1, p. 2.

¹⁴ Ducommun Testimony, *supra* note 6, p. 46, ll. 29 ("Ducommun Testimony"); and McGivney, August 19, 2011, p. 11, ll. 38 ("McGivney Testimony").

¹⁵ McGivney Testimony, *supra* note 12, p. 3, ll. 45.

decision in *Haida Nation v. British Columbia (Minister of Forests)*.¹⁶ However, MNBC supports another DFO policy that the AFS Agreements are not a tacit acknowledgement of Aboriginal fishing rights.¹⁷ There should be no concern that any consultation or AFS agreement would be considered an acknowledgement of an Aboriginal right. MNBC is not seeking the DFO's acknowledgment of their rights. Rather, MNBC is seeking meaningful consultation as legally required. So, the policy to not consult unless a right is proven in court is both illogical and illegal.

RECOMMENDATION 1: *It is recommended that until another preferable process is available, on account of the prima facie right of the Métis to fish in the Fraser River fishery, the DFO consult MNBC regarding the Fraser River fishery.*

Management Agencies, Structures, and Policies

An abundance of investigations, reviews, reports and considerations about the state of the salmon fishery in the North West have generally been in considered of the protection, preservation and sustainability of the salmon stocks in British Columbia and, by extension, in the Yukon, Washington State and Alaska. The British Columbia salmon fishery is the subject of a treaty between the Government of Canada and the Government of the United States of America ("Pacific Salmon Treaty"). The Pacific Salmon Treaty established a commission to make recommendations and advice to the two parties on the matters comprising the subject of the treaty.¹⁸ This treaty has, as its guiding principles, the development by each party of "salmon enhancement programs so as to: (a) prevent overfishing and

¹⁶ *Haida*, *supra* note 5.

¹⁷ McGivney Testimony, *supra* note 12, p. 11, ll. 30.

¹⁸ Exhibit 65, "Treaty Between the Government of Canada and the Government of the United States of America Concerning Pacific Salmon", p.3.

provide for optimum production: and (b) provide for each Party to receive benefits equivalent to the production of salmon originating in its waters."¹⁹

Although federal and provincial governments and the DFO recognize that conservation of the Fraser River sockeye is the primary objective of DFO policy, the DFO still appears to appraise the sockeye fishery's ultimate value as a viable commercial enterprise. This view, which is supported by the provisions of various DFO guides, direction, and policy including the Wild Salmon Policy ("WSP") may not completely accommodate the intrinsic value of the Fraser River sockeye as a unique species ranging from the Yukon to the North Western United States of America. In addition, the characterization of the value of the Fraser River sockeye in terms of a resource to be accessed for its commercial capabilities does not recognize its full value as a food staple for a large number of British Columbian families, Aboriginal and non-Aboriginal, who rely upon that fishery for basic nutritional needs.²⁰

Recognition of the government obligations to the Aboriginal people of Canada has resulted in changes to the manner DFO policies are created and delivered. However, it is submitted that recognition of the entitlement of First Nations does not completely satisfy the rights and entitlement of other Aboriginal groups under s. 35 to be consulted with respect to the impact of government action in relation to the Fraser River sockeye fishery on those groups.²¹ The process for consultation by DFO district and regional managers and various mandated and interested parties such as First Nations bands, other Aboriginal groups, commercial fishermen and recreational fishermen is elaborate. The object of the consultation process is the development of *Integrated Fisheries Management Plans* ("IFMP") developed through a consultation process through an *Integrated Harvest Planning Committee* ("IHPC"). The IFMPs determine the area, allocation and compliance

¹⁹ Exhibit 65, "Pacific Salmon Treaty", p. 7. ("Exhibit 65")

²⁰ *Ibid*, p7; p 32; Exhibit 8, "Wild Salmon Policy, Objectives", p. 9.

²¹ Affidavit #1 of Susan Farlinger, Sworn June 20, 2011 p. 1 para 2. ("Farlinger Affidavit")

requirements of the fishing party. Advice and direction in relation to science, salmon enhancement and habitat and policy is included in the IFMP.²²

The DFO national headquarters are based in Ottawa, Ontario from which the Pacific regional centre, headed by the Regional Director General delivers the programs as directed by the national headquarters through Regional Program Directors. Area Directors deliver the programs as directed by the national headquarters through Regional Program Directors. The Area Directors receive assistance from Area Managers on such issues as resource management, business management and habitat enhancement and Aboriginal affairs.²³

The Pacific Region, whose headquarters are based in Vancouver, is geographically divided into 5 areas, each having an Area Director who is responsible for the Ministry's programs in that region. Directions are determined through decisions made by a Regional Management Committee chaired by the Regional Director General. This Committee, supported by strategic, operations and Human Resources committees, develops and implements regional priorities, promotes integrated management and deals with budget and human resources concerns.²⁴ The Pacific Regional office conducts a consultation process with mandated or interested parties such as First Nations, commercial and recreational fisheries, and environmental advocacy groups. The Pacific Regional office also carries out ongoing processes such as Federal-Provincial agreements, consultations with First Nations, the Integrated Salmon Harvest Planning Committee, the Commercial Salmon Advisory Board, the Sport Fishing Advisory Board and the Salmon Enhancement and Habitat Advisory Board as well as working with the Pacific Salmon Commission.²⁵

The focus of the DFO with respect to the Fraser River sockeye fishery is on promoting conservation, sustainable use and consultation that is conducted in accordance with the federal consultation policy: *Aboriginal Consultation and*

²² *Ibid.*

²³ Exhibit 15, "Fisheries and Oceans Canada Organizational Structure, Nov. 1, 2010", p.5-12. ("Exhibit 15").

²⁴ *Ibid.*, p.14- 16.

²⁵ *Ibid.*, p. 17.

Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult. This policy document confirms Canada's obligation, as determined by Court decisions, "to consult and, where appropriate, accommodate when the Crown contemplates conduct that might adversely impact potential or established Aboriginal or Treaty rights."²⁶ It was noted that conduct triggering the obligation of Canada to consult may arise through actions and decisions of federally constituted boards or tribunals or as a result of senior or executive decisions. In 2008, the Federal Government established an action plan, implemented through the Ministry of Indian and Northern Affairs Canada, as a response to court decisions. The *Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* provides advice and assistance to DFO officials to fulfill their consultation obligations and is a comprehensive guide for the consultation process as carried out by DFO district and regional managers when dealing with various mandated and interested parties such as First Nations bands and other Aboriginal groups. Although there is an obligation on the Government of Canada to consult with Aboriginal groups as stated above, there is no corresponding obligation by governments, either Federal or Provincial, to consult with other special interest groups.

However, with respect to the Fraser River fishery, including the sockeye fishery, the DFO has created an elaborate consultation process, noted above, pursuant to which Aboriginal groups (specifically stated to be First Nations in DFO policy), commercial fishermen and recreational fishermen can access their respective fisheries. The IFMPs with commercial and recreational fishermen having proceeded throughout the IHPC process appear to be developed subsequent to the processes, negotiations and agreements between the DFO and the First Nations fisheries.²⁷

²⁶ Exhibit 1212, "Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult, Executive Summary", p.1.

²⁷ Farlinger Affidavit, *supra* Pp.1-3, pgr 2; Transcript, September 2, 2011, p.5, 1.39-p.10, l. 19, Eidsvik and McGivney.

The consultation process appears to be carried out by the responsible DFO officials consult with and apparently create interim or long term bi-lateral agreements with First Nations with respect to the management of a particular fishing area prior to consultation with other stakeholders including the commercial and recreational fishery in that area. Accordingly, non-Aboriginal users of the Fraser River sockeye resource may have support for their belief that the “sockeye resource pie” has been divided before the interests of the non-Aboriginal stakeholders have even been considered. Whether or not the belief is well founded, it is supported by the Regional DFO Office policy, that envisions prior to consultation and engagement with First Nations. During cross-examination Ms. Farlinger, RDG of the DFO Regional Pacific Office, stated that

...at a number of levels and through a variety of processes. For example, several hundred consultation and dialogue sessions take place through direct, bilateral meetings between DFO and First Nations as a local level.

This can include specific engagement on the draft IFMP or other issues during pre-season, in-season or post-season planning. In addition to consultations at the local level, DFO works with First Nations at the aggregate or watershed level. For example, the Aboriginal Aquatic Resource and Oceans Management (AAROM) program supports Aboriginal groups in coming together to participate effectively in advisory and decision-making processes to support resource management.²⁸

The planning process does include consultation and input from individuals and committees in programs and processes including the IHPC, the *Fraser River Sockeye Spawning Initiative*, the *Salmon Enhancement and Habitat Advisory Board* and various commercial interests. However, there is an apparent real and persistent concern that continues within the Fraser River commercial fishery that has resulted in a frustration and, on occasion, individual action.²⁹ Although the

²⁸ Farlinger Affidavit, *supra* P. 4 pgr. 14.

²⁹ Transcript, September 2, 2011, Pp. 14, 1.26-p.15, l. 3. Eidsvick and McGivney; and p. 22, l. 41 – p.37, l. 12, DeForrest and McGivney.

obligation to consult with Aboriginals meaningfully and in good faith is acknowledged by DFO directors, the DFO has determined that the only Aboriginal group with recognized rights and entitlement to the fishery resource are the First Nations groups existing along the Fraser watershed. As a result, Aboriginal groups other than First Nations, such as the Métis and non-status First Nations, have been left out of the consultation process.

It appears that DFO has now signaled a policy change pursuant to which Aboriginal groups will have the opportunity to determine entitlement and rights through negotiation. It is submitted that current actions by DFO officials, supported by the DFO policies referred to above, indicate that the DFO is determining right and entitlement to be consulted in relation to government actions surrounding the Fraser salmon fishery. In particular the DFO is consulting with First Nations bands who, while not having established their right and entitlement to be consulted through a court process are being brought into the consultation process. The resulting agreements may ultimately take the form of modern treaties or negotiated IMFPs with First Nation bands, who are represented within a First Nations coalition or otherwise located on the Fraser River watershed and thereby deemed to be entitled to the consultation process.³⁰ That change in policy is welcome relief particularly for British Columbian non-First Nations groups and communities.

Litigation is costly, not only in financial terms but to society generally. The financial cost of litigation lends to a general concern that only those members of the Canadian public who can afford to be heard in Court will have an opportunity to advance their cause. The litigation process is complex, time consuming and may develop acrimony between the litigants. For example, in the case of Aboriginal owners or users of the sockeye salmon resource interested parties would be expected to work together with each other and the DFO to carry out the main principles of negotiated IFMPs. However, the litigation to prove that entitlement would damage the relationships before they began. IMFPs are expected to be based

³⁰ Transcript, September 2, 2011, Pp. 14, l.26-p.15, l. 3. Eidsvick and McGivney; and p. 22, l. 41 – p.37, l. 12 , DeForrest and McGivney.

on cooperation in order to fulfill the conservation, preservation and sustainability concepts developed by the DFO and commonly referenced in their policies and programs. It is submitted that if there is a role for litigation in the relationship between the DFO and the various mandated and other users of the sockeye salmon resource it should be relegated to the area of enforcing the IMFPs. Crown funding, allocated for litigation in defending Aboriginal rights claims, would be better spent in the creation of a protocol wherein claims of entitlement and right, whether of Aboriginal, commercial, or recreational, will be determined through a negotiated and mediated process.

RECOMMENDATION 2: *It is recommended that Canada create an independent liaison office through the Ministry of Indian and Northern Affairs, or any other appropriate Ministry, with the authority to enter into negotiations with parties who, having provided prima facie evidence of entitlement, right, or a definable and enforceable interest in the fishery, and in particular the sockeye salmon fishery, for the purpose of defining the entitlement, right or enforceable interest and to advise the DFO with respect to the strength or weakness of the determined entitlement or right and provide advice and direction to the DFO with respect to a recommended course of action in relation to that party.*

RECOMMENDATION 3: *It is recommended that the DFO review their current policy and procedure with respect to the duty to consult and provide a transparent process through which consultation between all users, mandated or otherwise, be invited to take part in a meaningful consultation process prior to the conclusion of any agreement, bilateral or multilateral, with any one stakeholder in the Fraser River sockeye fishery.*

Métis World View and Traditional Knowledge

The Métis worldview is based on their mixed race heritage. This unique worldview on the problem of the Fraser River fishery combines the perspectives of

European and First Nation heritages. Captain Ducommun, who appeared on behalf of MNBC, explained that

*... because we're a mixed race people, we tend to pull the best we can from each of our European, primarily, and First Nations roots, and one of the things that's actually reflected in our **Natural Resources Act** quite strongly is that we try to balance traditional knowledge with what we call western-based science and it's actually written into our process that we have to look at traditional knowledge in any decisions that we make related to national resource management.*³¹

The *Natural Resources Act* authorizes MNBC's regulatory authority over the natural resources used by Métis citizens.³² Specifically, one purpose of this Act is to "establish natural resource regulation, policy and guidelines by combining both Métis traditional knowledge and western-based science management principles".³³

Traditional knowledge has a role in enhancing the current decision-making process through consultative committees.³⁴ Further, it is important that the governments and government agencies consider traditional knowledge. Although the DFO almost entirely favours empirical studies, empirical studies are slowly starting to come to the same view as traditional Aboriginal knowledge. Captain Ducommun was clear in his testimony that

... fish, not only just being part of the ecosystem they belong to, they're a key part, ...[of] the ecology of any area where they exist, it really depends on them. So everything – you know, everything that walks, swims or flies is going to eat a salmon at sometime in its life, it seems like, in British Columbia, and beyond that, you know, the plants and trees, as well really require those nutrients when they come back from the sea. And one of the things that we're – and I think DFO has known for a long time because they've actually artificially added nutrients to

³¹ Ducommun Testimony, *supra* note 6, p. 46.

³² Exhibit 307, "Métis Nation of British Columbia *Natural Resource Act*", p. 3. ("Exhibit 307").

³³ *Ibid.*

³⁴ Exhibit 298, *supra* note 1, at p. 2.

sockeye lakes for quite a number of years, but I think that's one place where traditional knowledge and science are starting to agree...³⁵

Other government initiatives exist that attempt to integrate technical scientific expertise with traditional knowledge. One approach is taken in the federal *Species at Risk Act*.³⁶ The *Species at Risk Act* establishes the National Aboriginal Committee on Species at Risk ("NACOSR") whose six members represent the Aboriginal peoples of Canada.³⁷ NACOSR's mandate is to

- advise the Minister of the Environment on the administration of the Act, and
- provide advice and recommendations to the Canadian Endangered Species Conservation Council, which is composed of Ministers with environmental portfolios from the federal and provincial governments.³⁸

An alternative arrangement is the Committee on the Status of Endangered Wildlife in Canada ("COSEWIC") who has developed a sub-committee to incorporate traditional Aboriginal knowledge into analysis and policy decisions.³⁹

Another benefit from incorporating Aboriginal traditional knowledge is engaging Aboriginal peoples in DFO policy development from the ground up. In this scenario, the DFO is more likely to acquire the support of Aboriginal groups if they are adequately consulted and understand the basis for the DFO decision. Rather than conflict over DFO policies, Aboriginal peoples will have the opportunity to influence, understand, and support DFO decision-making with respect to the salmon if their perspectives are consulted in good faith. At the same time, the DFO will acquire access to a large and engaged stakeholder groups as a result. MNBC advocates the balancing of conservation and resource management with promoting

³⁵ Ducommun Testimony, *supra* note 6, at p. 47, ll. 19.

³⁶ *Species at Risk Act*, R.S.C. 2002 c. 29.

³⁷ *Ibid.*, s. 8.1. For more information on the National Aboriginal Committee on Species at Risk see http://www.nacosar-canep.ca/home_en.php.

³⁸ *Ibid.*

³⁹ Exhibit 298, *supra* note 1, at p. 2. For more information on the Committee on the Status of Endangered Wildlife in Canada see <http://www.cosewic.gc.ca/>.

access to Aboriginal rights. It submits that the DFO must take a similar approach to the restoration of the Fraser River fishery.

The DFO must take a more holistic approach to the fishery and not focus so explicitly on its commercial interests. MNBC has banned all commercial harvesting because it is concerned with conserving an important resource.⁴⁰ Any harvesting is subject to licensing and registration with the Natural Resources Ministry.⁴¹ In other words, MNBC is taking a serious approach to managing the harvesting of its key natural resources. The Fraser River fishery is a public asset.⁴² The preservation of the Fraser River fishery is a public necessity and it should take precedence over individual interests. MNBC suggests that the DFO take a serious look towards ensuring that the Fraser River fishery recovers and is available for future generations. The first step in doing so is to develop a system of integrated knowledge, combining the traditional knowledge of Aboriginal communities with technical interests at the DFO and the commercial interests of the private fisheries.

RECOMMENDATION 4: *It is recommended that the DFO integrate traditional knowledge with its technical knowledge to arrive at better decisions aimed at preserving the Fraser River fishery for future generations.*

Fisheries Enforcement and Monitoring

DFO enforcement and monitoring relies nearly exclusively on fisher and First Nations reporting.⁴³ Mr. David Bevan, Associate Deputy Minister at the DFO, does not believe that monitoring is an essential component of managing a fishery.⁴⁴ It is submitted that the only responsibility of the DFO in managing a fishery is to ensure

⁴⁰ Exhibit 307, *supra* note 14, p. 4.

⁴¹ *Ibid.*

⁴² Policy and Practice Report 3, "Policy and Practice Report Legislative Framework Overview" November 1, 2010, p. 3.

⁴³ Testimony of Leslie Jantz, May 11, 2011, p. 15, ll. 34. ("Jantz Testimony")

⁴⁴ September 22, 2011, p. 18, ll. 17.

that the resource remains viable, and the only method of doing that is monitoring. The DFO is passing off its responsibility, and perhaps its mandate, for monitoring and regulating the fishery to the very commercial interests the DFO has a mandate to monitor.⁴⁵ This situation is insufficient for two reasons.

First, the DFO does not consult with each stakeholder. For example, MNBC estimates that the Métis alone harvest roughly 100,000 Sockeye salmon from the Fraser River.⁴⁶ This interest is significant for an Aboriginal fishery, even though it is relatively small compared to commercial fisheries. Mr. Jantz, Area Chief of Resource Management for British Columbia Interior, testified that

The concern I have is what is going to happen post March 2012. There are opportunities for improving some of the catch estimates in the section of the Fraser River immediately above what we call the mid-river area, so it's the upper Fraser. In that particular area, we don't have full coverage of the fishery and our current funding levels through AFS programs primarily, in many years, often do not cover the full duration of the fishery... There are a number [of groups without AFS dollars] in the Interior, primarily terminal harvesters, so their catch levels are not very large. But nevertheless, they are not monitored. We do not have information for those fisheries...⁴⁷

In other words, the DFO does not consult or engage with all the Fraser River Aboriginal groups: First Nations, non-status Indians, and Métis. A monitoring system that relies on user reporting cannot function unless all the users are reporting. This is particularly important when there are more interested parties in harvesting fish and there are less fish to go around.⁴⁸

The DFO ignores the Métis, a group that wants to consult with them and openly harvests from the Fraser River despite having a deficit in information and a greater need for accuracy. For example, the Pacific Region DFO refuses to enter into an AFS agreement with the Métis despite knowing that

⁴⁵ *Ibid*, ll. 22

⁴⁶ Ducommun Testimony, *supra* note 6, p. 49, ll. 9.

⁴⁷ Jantz Testimony, *supra* note 6, p. 20-21, ll. 39.

⁴⁸ *Ibid*, p. 25, ll. 38.

1. DFO offices in other regions have entered into AFS agreements with Métis communities,⁴⁹ and
2. the Métis occupy territory throughout the Fraser River fishery and would be able to collect data from across the region.⁵⁰

The DFO's shortsighted perspective on this matter ignores the tremendous benefit that consultation would bring to their monitoring. Captain Ducommun testified that

*... Métis have something to contribute to the management of salmon along the Fraser, and one of the things that that might be is that we have interests along the entire migration route of those fish, and so we have a different kind of view than some First Nations who kind of have a piece along the route where they have interests.*⁵¹

Consulting with all the Aboriginal groups would assist the DFO remedy its dataset deficit in areas that are currently unmonitored. The important issue is that the DFO does not have monitoring data with respect to significant portions of the fishery and in a user-reporting system of monitoring; this is unacceptable.

The second problem is that there is no independent validation of the catch numbers occurs.⁵² The DFO has delegated its monitoring to largely commercial and First Nations agencies without ensuring that the catch numbers are accurate. Further, the audits that do take place are not a daily occurrence.⁵³ It is not clear how the DFO can claim any empirical authority in its statistical reports when these reports are largely unverified. The DFO does not even have an idea of the amount of illegal or unauthorized fishing that does occur, so it cannot even provide support for

⁴⁹ Exhibit 298, *supra* note 1, p. 3. *Ducommun Testimony, supra* note 2, p. 48, ll. 30 Captain Ducommun testified that there is a notion that Métis Aboriginal rights do not apply in British Columbia. See section 2 of these submissions where it is argued that the Métis have a prima facie Aboriginal right under s. 35 and, as a result, ought be consulted.

⁵⁰ *Ducommun Testimony, supra* note 2, p. 47.

⁵¹ *Ibid*, ll. 1.

⁵² Parslow, May 11, 2011, p. 20, ll. 27.

⁵³ *Ibid*.

its monitoring systems. Mr. Parslow, Management Biologist at the DFO's Annacis office for the lower Fraser area, testified that

Q... Do you have any systems in place to estimate illegal or unauthorized catch?

MR. PARSLOW: No, we don't. Not at the current time.

Q: Do you obtain information from the Conservation and Protection Branch in regards to illegally caught fish and the numbers of those?

MR. PARSLOW: It's something which we've been working on over the last two years is to build a system for that information to be provided. So, yes, it's something which is in development.

Q: Currently those numbers don't go anywhere?

MR. PARSLOW: No, they aren't used in the management, no.

Further, the enforcement of DFO regulation appears weak. As of April 1, 2011, the DFO has \$1,022,719.68 in outstanding fines.⁵⁴ Mr. Nelson, the Regional Director of Conservation and Protection for the Pacific Region, testified that he was not aware of the system for collecting these fines.⁵⁵ Mr. Nelson only became aware of the relationship of the public prosecutor during this commission. It is clear that the DFO has taken a relaxed position on enforcing its fines. So, the DFO cannot estimate the amount of illegal or unauthorized harvesting and, when it does fine an individual or corporation its officers are unaware of the process to collect that money. This amounts to a relatively lax monitoring and enforcement system for a resource that is quickly diminishing.

⁵⁴ Exhibit 873, "Pacific Region Fishery Related Fines 2008 - 2011", p. 1.

⁵⁵ April 8, 2011, p. 68, ll. 34.

RECOMMENDATION 5: *It is recommended that if the DFO decides to continue with the user-reporting monitoring system then*

A) *the DFO must engage with all stakeholders using the fishery, including all First Nations, non-status Indians, and Métis; and,*

B) *the DFO must develop a proper system of validating the catch numbers and enforcing any breaches of the regulation.*

Habitat Management and Enforcement

MNBC also recognizes that Recommendation 5 applies to habitat management and enforcement. However, MNBC has a one general concern about the approach to management and habitat protection. It is submitted that a conservation perspective must be the foregoing consideration with respect to habitat management and enforcement.

. Habitat management and enforcement is a larger issue than merely with respect to fish. Many different environmental agencies are involved, both governmental and non-governmental, and it becomes a confusing jurisdictional maze. The DFO has acknowledged that “fish habitat is not only essential to the production of fish, but also provides critical ecosystem services...”⁵⁶ Despite having strong environmental protection legislation found in the *Fisheries Act*,⁵⁷ the DFO has reported only 2 convictions under these provisions and 37 charges in 2008 and 2009.⁵⁸ It appears incongruous that the DFO does not have that an affirmative regulatory duty with respect to habitat when one of its primary purposes is to monitor the fisheries. A conservationist oriented approach mandate that the DFO monitor and enforce the legislation in the *Fisheries Act* strictly.

⁵⁶ *Policy and Practice Manual 8: Habitat Management and Enforcement*, April 7, 2011, p. 3. (“PPR8”)

⁵⁷ *Fisheries Act*, R.S.C. 1985, c. F-14, s. 34 – 42.1.

⁵⁸ PPR8, *supra* note 41, p. 4.

In addition, the No Net Loss principle, in which the Department strives to balance unavoidable habitat losses to development with habitat replacement,⁵⁹ is largely a feature of backwards thinking about the maintenance of a natural resource. The current No Net Loss strategies focus on the fish as an individual economic unit rather than a part of the larger ecosystem. The three replacement strategies of securing replacement habitats (first option), off-site replacement or increasing productivity (second option), and artificial production (third option) ignore the impact loss of natural salmon habitat has on the rest of the ecosystem.⁶⁰ The fish are simply regarded as units that must be increased in order to maintain a stable local economy.

Another example is the Minister's denial to place the Cultus and Sakinaw populations of the Sockeye salmon on the endangered species list based largely on economic interests. COSEWIC, the agency responsible for assessing the status of wildlife species under the *Species at Risk Act*, recommended that the Cultus lake population be placed on the endangered species list.⁶¹ The Minister's reasons for denying this application state that

*Although the COSEWIC assessments for the Cultus and Sakinaw populations make it clear that those populations are at very low levels and are at risk of biological extinction, adding them to the List as "endangered" would lead to severe consequences for the south coast British Columbia (BC) sockeye salmon fishing sector and for the coastal communities, including first nations, who depend on salmon fishing.*⁶²

MNBC is not in a position to dispute this decision but it is indicative of the importance economics has in relation to the conservation and management of the sockeye salmon fishery. Although the Minister refers to Aboriginal interests, it appears that the largest factor in the decision was commercial interests, which was

⁵⁹ *Ibid*, p. 14.

⁶⁰ Replacement strategies are discussed in *Ibid*, p. 19.

⁶¹ *Ibid*, p. 6.

⁶² Order Giving Notice of Decisions not to add Certain Species to the List of Endangered Species, P.C. 2005-5, C. Gaz. 2005.II.139, online: Canada Gazette, http://www.sararegistry.gc.ca/virtual_sara/files/orders/g2-13902i_e.pdf, p. 113.

unsuccessfully challenged by the Sierra Club of Canada, British Columbia Chapter.⁶³ Not only the mere presence of economic factors but the primacy of those factors in a decision denying a recommendation from an expert committee that a population becoming endangered is concerning from a conservationist perspective.

In essence, MNBC submits that the DFO consider the larger perspective and focus on conserving the present sockeye salmon populations to improve the future of the Fraser River fishery. Captain Ducommun stated this perspective well when he testified that

... there's a multitude of reasons why we're in the situation we're in. We're not going to find, you know, the silver bullet of why sockeye salmon have disappeared. You know, they've disappeared because there's a lot of pressures, you know, from habitat, from water use, from aquaculture, from fisheries and, you know, we have to really look at the big picture and try to figure out where -- you know, what are the big contributors and how do we deal with them, but also what are the smaller contributors to the reason why we can't recover these stocks?⁶⁴

RECOMMENDATION 6: *It is recommended that the DFO focus on conservation of the present sockeye salmon populations rather than securing the present commercial interests.*

Wild Salmon Policy

The Wild Salmon Policy is the culmination of a number of commissioned and committee investigation and reports. The following is a brief review of that summary report as a backdrop to a consideration and review of the WSP. A

⁶³ See generally Exhibit 896, "OAG Decision not to list Cultus and Sakinaw Lake sockeye salmon under the Species at Risk Act".

⁶⁴ Ducommun Testimony, *supra* note 6, p. 49, ll. 24.

summary of reports from 1982 to 2010 prepared by the DFO dated May 17, 2010 and provided to the Commission follows:⁶⁵

One 1982 report envisioned a strategy, based on the final report of the Commission on Pacific Fisheries Policy. Among other things, the report called for Federal/Provincial co-operation in creating policies with respect to; a) fish habitat management in British Columbia; b) fisheries management envisioning long term plans for managing the salmon resources including an assessment of the state of the salmon stocks, a review of the problems arising from fishing patterns, improving conservation; c) salmonid enhancement programs with appropriate funding; d) research and information management through collection and summarizing of statistical data; e) developing a framework for commercial licensing; f) recognizing the development of mariculture leases and ocean ranching; and i) assistance towards the maintenance of First Nations fisheries and an allocation of a quantity of fish annually to each band.

Enforcement included compensation for the loss of habitat and fish production for damages caused to the habitat; encouragement of public reporting of violations; the development of a “vigorous and well-organized enforcement capability” an increase in the scale of fines with the seizure and forfeiture of vessels in appropriate circumstances; and license cancellation.

The Government response to the recommendations was varied. By 1983, many of the recommendations were either under review or under discussion. By 1986, many of the Pearse recommendations were incorporated into a document called the *Department of Fisheries and Oceans Policy for the Management of Fish Habitat*.⁶⁶

Subsequent committee reports including the 1992 reports by Dr. Pearse⁶⁷ and Dr. Larkin⁶⁸ clearly identified the primary objective of the DFO was the protection and conservation of the salmon in the Fraser River. Government

⁶⁵ See generally Exhibit 14, “A Summary Of Recommendations Related To FRS and Responses by GOC” (“Exhibit 14”).

⁶⁶ *Ibid*, Pp. 9-45.

⁶⁷ *Ibid*, p. 53 – 61.

⁶⁸ *Ibid*, p. 62 – 67.

response to the 1992 Pearse report initially noted that its role was, among other things to mould "a social contract with Aboriginal Peoples while maintaining predictability, profitability and order in the commercial and sports fishing. Subsequently, the Government worked together with First Nations bands to develop agreement for the purposes of assisting in the management of Fraser River salmon and with the commercial and recreational fishery, together with First Nations bands to form an advisory group.⁶⁹

By December 1992, there was evidence of substantial overfishing and a commitment ensued to ensure that such overharvesting would not re-occur. The priority of conservation of salmon stocks was re-iterated. The issue was, in part, based on inadequate monitoring. That inadequacy was dealt with by requiring First Nations to provide a census of catch through mandatory landing sites and requested DFO officials to provide weekly catch estimates and pre-season estimates of Fraser River sockeye salmon. At the same time, water temperature was determined to be high.⁷⁰

The 1995 reports of Hon. John Fraser and the Pacific Policy Roundtable renewed a focus on conservation of the Fraser River salmon stock. A strategy was developed to "*revitalize the west coast commercial salmon fishery and help conserve salmon stocks and ensure that they are harvested in ways that sustain their use for future generations.*"⁷¹

A working group comprised of all stakeholders in the salmon fishery was instituted. There continued to be concern surrounding the estimation and actual census of salmon catch. New strategies were proposed for employment in monitoring catch including using new technology. Further, it was recommended that First Nations have enhanced access to and involvement with the Fraser River salmon. The result is that First Nations representatives had an increased presence on the *Pacific Salmon Commission Fraser River Panel* as well as more involvement in

⁶⁹ *Ibid*, p. 53-61.

⁷⁰ Exhibit #14 Recommendations Related to Fraser River Sockeye Salmon and Responses by the Government of Canada 1982-2010, May 17, 2010 Pp. 61-66.

⁷¹ Exhibit #14 Recommendations Related to Fraser River Sockeye Salmon and Responses by the Government of Canada 1982-2010, May 17, 2010, p. 69

the consultation process. *The Fraser River Panel* (FRP) now conducts pre-season and post-season performance reviews. It should be noted that enforcement was recommended to be an essential element of fishery management.⁷²

In 1996, Dr. May issued his report in which conservation issues were stated to be paramount. Issues surrounding the allocation of Fraser River salmon were the subject of a number of consultations. The DFO response set the stage for the current basis of allocation wherein after conservation, the food, social and ceremonial needs and treaty obligations to First Nations stand in priority to other allocations.⁷³

In response to the Federal/Provincial review of the Mifflin Plan, a committee known as the *Pacific Fisheries Resource Conservation Council* (PFRCC) was established for the purpose of, among other things, providing advice for stock enhancement, habitat restoration and improvement and conservation objectives. An element of the recommendations concerned the promotion and marketing initiatives.⁷⁴

The Doug Kerley report in 1996 responded to economic matters faced by individuals and communities suffering due to job loss. An initiative to entice recreational fishermen to come to British Columbia to fish was proposed⁷⁵

James Matkin provided his findings and recommendations, which were accepted by DFO with respect to the development of Pilot sales fisheries.⁷⁶

Habitat management recommendations resulted in a watershed based sustainability program as a result of the Auditor General's report in 1997.⁷⁷

⁷² Exhibit #14 Recommendations Related to Fraser River Sockeye Salmon and Responses by the Government of Canada 1982-2010, May 17, 2010 Pp 72-75

⁷³ Exhibit #14 Recommendations Related to Fraser River Sockeye Salmon and Responses by the Government of Canada 1982-2010, May 17, 2010 Pp 104-107

⁷⁴ Exhibit #14 Recommendations Related to Fraser River Sockeye Salmon and Responses by the Government of Canada 1982-2010, May 17, 2010 Pp. 114-119

⁷⁵ Exhibit #14 Recommendations Related to Fraser River Sockeye Salmon and Responses by the Government of Canada 1982-2010, May 17, 2010 Pp. 120/121

⁷⁶ Exhibit #14 Recommendations Related to Fraser River Sockeye Salmon and Responses by the Government of Canada 1982-2010, May 17, 2010. Pp 122/123

⁷⁷ Exhibit #14 Recommendations Related to Fraser River Sockeye Salmon and Responses by the Government of Canada 1982-2010, May 17, 2010 122-126

In 1998, Gordon Gislason & Associates, Charles Hubbard, M.P. each provided reports on various subjects surrounding the Fraser River fishery. The Gislason report was directed at recommending programs to deal with the high unemployment rate of British Columbia fishermen.

The Hubbard report (based on the Report of *The Standing Committee Fisheries and Oceans Canada*). The result was the implementation of the recommended restructuring of DFO with the majority of DFO staff being relocated to DFO regional offices. Further, there was a strong recommendation to ensure that stakeholders were actual participants in the fishery. The result was the formation of the *Pacific Fisheries Resource Conservation Council* and independent allocation advisory boards together with the *Pacific Science Advice Review Committee* (PSARC) whereby the public could obtain scientific information provided to DFO. That report noted that there was a "loss of trust between the government and the fishing community" with the subsequent release of the *Allocation Policy for Pacific Salmon* and *Allocation Framework for Pacific Salmon 1999-2005* and increase participation in the PSARC the result. There was also a recognized need to resolve matters between Canada's international partner in the *Pacific Salmon Treaty* (PST) with a view to sharing the arrangements for conservation and harvest matters. In addition, the report recommending a review of the DFO habitat restoration and protection policy with the result that DFO together with the Province of British Columbia became engaged in a number of initiatives with that purpose.⁷⁸

In the 1999 report of the Auditor General of Canada, there was a recommendation to proceed to identify the Conservation Units (CU) for Pacific salmon. Since that date, the WSP has been adopted (2005) and it provides for the establishment of CUs in the Fraser River watershed pursuant to which the status and habitat of Fraser River salmon will be assessed. Data collection and reporting by First Nations under the Aboriginal Fisheries Strategy was reported to have become more proficient in response to the recommendation that the conservation and sustainability of the Fraser River salmon is dependent on accurate and timely

⁷⁸ Exhibit #14 Recommendations Related to Fraser River Sockeye Salmon and Responses by the Government of Canada 1982-2010, May 17, 2010 Pp 127-142

reporting of relevant data. In addition, DFO confirms that IFMPs are comprehensive. The WSP based objective is to ensure long-term sustainability through the establishment of CUs to determine harvest rates and escapement levels. DFO also confirmed that the Government of British Columbia and DFO were jointly working on a number of issues. Monitoring and enforcement issues were being addressed through a *Program for Sustainable Aquaculture (PSA)*, a five year program with Government financial investment.⁷⁹

The Institute for Dispute Resolution was concerned with the consultation process. DFO has devised a consultation framework and, for transparency, has developed a relationship with First Nations and refers to its *Commercial Salmon Advisory Board* and the Area Harvest Planning Committees with respect to commercial fisheries. The report also recommends multi-party negotiations to be used by the *Allocation and Licensing Board (ALB)*. In addition the DFO refers to the *Integrated Salmon Dialogue Forum* where representatives of First Nations, commercial and recreational fisheries, the Province of British Columbia, environmental groups and DFO have input with respect to allocation, catch monitoring and governance process. The Institute also recommended the implementation of a Policy Advisory Committee that was not established. DFO did refer to new structures that would be as efficient. There is also a recommendation to establish a code of conduct, which the institute suggested should provide for inclusive, transparent, and accountable participation process. The DFO suggests that its *Integrated Salmon Harvest Planning Committee (IHPC)* Terms of Reference dated May 2, 2005 provides for the recommended transparent, accountable, effective and inclusive representation.⁸⁰

The 2005 reports of Tom Wappel M.P. and Patrick Chamut, in addition to matters such as restoring funding, establishing adequate aboriginal food fisheries and stable access to the salmon resource for commercial and recreational fisheries,

⁷⁹ Exhibit #14 Recommendations Related to Fraser River Sockeye Salmon and Responses by the Government of Canada 1982-2010, May 17, 2010 Pp 150-160.

⁸⁰ Exhibit #14 Recommendations Related to Fraser River Sockeye Salmon and Responses by the Government of Canada 1982-2010, May 17, 2010 Pp 161-199.

the Chamut report clearly envisioned the establishment of the WSP after full consultation with all interest groups. Identification of CUs and CU benchmarks was set to be complete in the fall of 2010. The Chamut report also was concerned with enhanced development of the DFO – First Nations relationship, a monitoring and enforcement policy communications with commercial and recreational fisheries.⁸¹

The Office of the Auditor General of Canada called for the finalization of the WSP while DFO noted the Government's response to the reports of Donald McRae and Peter Pearse and the report entitled *Our Place at the Table, First Nations in B.C. Fisheries* that "half measures will not restore the salmon industry to profitability...We want to see a salmon industry that is sustainable in the long term and able to deal with declining value's and fluctuations in stock." and "the same rules of fishing and the same standards for reporting catches should apply to all commercial fishers." The DFO noted that the *Vision and Principals for Pacific Fishery Reform* dated April 14, 2005 provides that "First Nations and stakeholders will assume a greater role in operational decision making and program delivery through effective co-management processes." and in response to the recommendation for a cost wide allocation policy, DFO referred to the Pacific Fisheries Reform Principles from the 1999 Allocation Policy that stated "certainty will be provided for allocations between harvest sectors (First Nations, recreational and commercial);...certainty of harvest share will be provided to commercial participants; and Commercial harvesters will enjoy a similar level of certainty regarding fisheries access."⁸²

In 2005, the year the WSP was adopted, Tom Wappel, M.P. and Bryan Williams, Q.C. each issued a report. Wappel recommended a separation between fisheries enforcement and fisheries management. DFO noted that enforcement and management were intertwined through the DFO Conservation and Protection program. The Wappel report further proposes tough action to limit fishing when

⁸¹ Exhibit #14 Recommendations Related to Fraser River Sockeye Salmon and Responses by the Government of Canada 1982-2010, May 17, 2010 Pp 200 - 220

⁸² Exhibit #14 Recommendations Related to Fraser River Sockeye Salmon and Responses by the Government of Canada 1982-2010, May 17, 2010 Pp 226 - 232

conservation of the stock requires. The DFO refers to an Environmental Management Adjustment model to determine risk factors and adjust fisheries management accordingly. The Williams report recommended regular meetings between First Nations, stakeholders and Conservation and Protection staff to assess catch monitoring. The DFO acknowledged gaps in fish monitoring and noted that consultation was on-going. Further, DFO acknowledged that a strategy should be established to obtain an estimate of unauthorized fishing and fish harvest with DFO retaining the ultimate authority for auditing catch monitoring data.⁸³

It should be noted that the reports considered above dealt with many matters not stated in this report. Often, recommendations called for increased funding for the establishment or incorporation of one or more recommended actions. However, there was general consistency in matters relating to the need for accurate and timely monitoring; an effective and capable enforcement policy; programs to enhance the consultation process to make it more accessible, transparent and effective; policies to improve the relationship between First Nations, stakeholders, environmental concerns and DFO staff; recognition of international relationships and commitments; policies to address the obligations of the Crown to Aboriginals; policies and programs to encourage the interest of the general public; and timely completion of programs and policies that are recommended. All of which was submitted as providing for the conservation and protection of the salmon, and for the purpose of this report, the sockeye fishery in the Fraser River watershed.

As stated above, Wild Salmon Policy a comprehensive, conservation/sustainability based policy with respect to the North West salmon stocks was adopted in 2005.

Does it fulfill the general expectations of the reporters referred to above? Is it adaptable enough to meet the challenges of a changing fishery environment? Will it assist the DFO in ensuring that its staff will have the tools to effectively monitor and enforce legislative and regulatory provisions and effectively deal with all parties

⁸³ Exhibit #14 Recommendations Related to Fraser River Sockeye Salmon and Responses by the Government of Canada 1982-2010, May 17, 2010 Pp 240-284

who are entitled to take part in the Fraser River sockeye fishery? Above all, will the WSP provisions be sufficient to ensure the conservation, preservation and sustainability of the sockeye salmon stocks in the Fraser River.

The WSP conservation policy is based on Conservation Units ("CU") that are definable portions of a salmon habitat. The definition of a CU provided by the DFO is "Groups of wild salmon living in an area sufficiently isolated from other groups that, if extirpated, that area is very unlikely to be recolonized naturally within an acceptable time frame."⁸⁴ The CUs vary between species so that certain salmon species are accorded a larger CU based on a number of factors while other species are organized with a smaller CU. For instance of the 435 CUs identified in British Columbia, 24 are attributed to river sockeye and 230 (more or less) are attributed to lake sockeye. Comparatively chum salmon are accorded 38+ CUs and Chinook 68+ (exhibit 97 page 18 ("Number of CUs by species in BC").

The Policy itself has, as its overriding theme, conservation and stewardship.⁸⁵

The advantage of a conservation policy based on CUs is that it offers an identifiable geographic base, provides the capability of maintaining diversity in salmon stocks within CUs and the ability to modify data and thereby accommodate changes in a CU with an appropriate response.⁸⁶ Further, because the geographic habitat and the salmon stock within a CU vary, productivity may vary and reduce the risk of complete loss of stock within a CU. In addition, connections between CUs mean that if the salmon stock in a single CU is affected the salmon population of an adjoining CU should help to recolonize that CU with the result that the loss of a spawning group within that CU would be temporary.

However, the disadvantage may be that there is need for accurate and timely data collection in relation to the salmon stock within a CU. In view of the statements and recommendations of the reports presented above, there may be a concern that accurate and timely data collection is not a current expectation.

⁸⁴ Exhibit #97, *The Build-up to Canada's Policy for conservation of Wild Pacific Salmon (1980-2000)*, Ridell , p.10.

⁸⁵ Exhibit 8 WSP page 2.

⁸⁶ Exhibit 8 Ibid, Pp6-12

RECOMMENDATION 7: *It is recommended that the DFO immediately take steps to ensure that data collection for all of the CUs on the Fraser Watershed is accurately provided in a timely manner through reviewable and traceable methods, whether by DFO personnel or through enforceable agreement with others.*

The WSP is presented as a flexible policy capable of adapting to changing conditions. Human activity and development including urbanization, forestry and range practices, industrial activity together with climate change has and will continue to affect sockeye salmon habitat. It will require a concerted effort by DFO, aboriginals, stakeholders, interested parties, governments, and the general public to ensure that not only will the sockeye stock be maintained in spite of loss or damage to habitat but will increase for the use and benefit of all.

This will require an effective enforcement policy together with programs designed to encourage the general public to become engaged in assisting the DFO through local offices, meeting with DFO staff including conservation officers and other front line staff and arrangements with First Nations and other aboriginal groups, and stakeholders to become involved with policy and program administration and delivery.

RECOMMENDATION 8: *It is recommended that the DFO commence a public awareness program to induce the general public to become engaged in the recovery, preservation and sustainability of the Fraser River sockeye. The Program might be delivered DFO front line staff and DFO managers and should include First Nations and other aboriginal groups, and other stakeholders and interested parties. The program might also be delivered through the Provincial education system for long term benefits through the efforts of today's children.*

It is noted that the wording of the WSP refers to Canada's obligations to Aboriginals but subsequently limits that wording to obligations to First Nations. It is submitted that Canada's obligations in relation to fishing for food, social and ceremonial purposes extends to all Aboriginals as stated in Section 35, that "includes Indians, Métis and Inuit".

It is on that basis that the MNBC recommends as follows:

That the WSP wording be revised to include the wording of Section 35 where appropriate and that subsequent consultation fulfill any obligations thereto

One of the concerns arising from the reports referenced above is the necessity for the DFO to take action.

The WSP has been guiding the DFO policy since 2005. The identification of the CUs has been completed. There should be no impediment to complete implementation of the WSP. The next steps have been identified in the Wild Salmon Policy Implementation draft Work Plans and Performance Reviews. Internal integration of the WSP should be completed and the necessary resources secured to accommodate the scientific, staffing and financial requirements to proceed to implementation of the WSP expeditiously.⁸⁷

RECOMMENDATION 9: *It is recommended that the DFO secure the necessary resources to implement the WSP strategies and that representatives of the participants to this Commission constitute a committee to meet no less than once annually for the purpose of reporting on any progress in the implementation of the WSP and recommending any policy direction, changes or procedure.*

⁸⁷ Exhibits 962 Wild Salmon Policy – Work Planning – Operations Committee – May 26, 2011; 963 Wild Salmon Policy Implementation Team – Terms of Reference - Draft; 964 Wild Salmon Policy Implementation Draft Work Plan 2011-2012; 966 Wild Salmon Policy Draft Implementation Gap Analysis – December 14, 2010.

Conclusion

Matters concerning the access to and use of the sockeye resources on the Fraser River are governed by an inordinately large number of processes, forums, committees, consultation groups and arrangements. Changes, additions or proposals are often accommodated by a new process or stage in the proceedings. The process may become stifling to a stakeholder.

In spite of the various protocols and arrangements between DFO and the parties with an interest in the Fraser River sockeye, significant issues exist between the First Nations and commercial fisheries. It is clearly necessary to reach some resolve of those issues. It seems unlikely that another committee or panel will result in a resolution and it is proposed that, through the WSP, working together in a "hands on" arrangement to deal with the current state of the sockeye salmon stocks may have some benefit towards a easing of tensions.

The WSP has the built in capacity and adaptability to meet the challenges of changing circumstances in the Fraser Watershed. However, there are a number of matters that require completion before the WSP strategies can be fully implemented. Some of those matters require funding commitments. It is proposed that DFO continue to work towards the full implementation of the WSP. Continued monitoring of the WSP implementation plan together with ongoing review, discussion and recommendations when and if necessary may be of assistance to the DFO in carrying out the objectives of the WSP. In summary, MNBC makes the following recommendations to the Commission:

- 1. That the DFO consult MNBC regarding the Fraser River fishery;*
- 2. That Canada create an independent liaison office to advise the DFO about the strength or weakness of an Aboriginal right and provide the DFO with a recommended course of action in relation to that party;*

3. *That the DFO review their current policy and procedure on the duty to consult and provide a transparent process for all users to consult prior to the conclusion of any agreement, bilateral or multilateral, with any one stakeholder in the Fraser River sockeye fishery;*
4. *That the DFO integrate traditional knowledge with its technical knowledge to arrive at better decisions aimed at preserving the Fraser River fishery for future generations;*
5. *That if the DFO decides to continue with the user-reporting monitoring system then the DFO must engage with all stakeholders using the fishery and develop a proper system of validating the catch numbers and enforcing any breaches of the regulation;*
6. *That the DFO focus on conservation of the present sockeye salmon populations rather than securing the present commercial or special interests;*
7. *That the DFO immediately take steps to ensure that data collection for all of the CUs on the Fraser Watershed is accurately provided in a timely manner through reviewable and traceable methods, whether by DFO personnel or through enforceable agreement with others;*
8. *That the DFO commence a public awareness program to induce the general public to become engaged in the recovery, preservation and sustainability of the Fraser River sockeye. The Program might be delivered DFO front line staff and DFO managers and should include First Nations and other aboriginal groups, and other stakeholders and interested parties. The program might also be delivered through the Provincial education system for long term benefits through the efforts of today's children; and*
9. *That the DFO secure the necessary resources to implement the WSP strategies and that representatives of the participants to this Commission constitute a committee to meet no less than once annually for the purpose of reporting on any progress in the implementation of the WSP and recommending any policy direction, changes or procedure.*

Respectfully submitted to the Cohen Commission on this 17th day of October, 2011

Date: October 17, 2011



JOSEPH GERELUK

Council on behalf of the Métis Nation of British Columbia

"Melanie Hudson"

Date: October 17, 2011

MELANIE HUDSON

Articled Student

**COMMISSION OF INQUIRY INTO THE DECLINE OF
SOCKEYE SALMON IN THE FRASER RIVER**

**INDEX OF AUTHORITIES ON BEHALF OF THE
MÉTIS NATION BRITISH COLUMBIA**

Case Law

1. *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004, SCC 73
2. *R. v. Powley*, [2003] 2 S.C.R. 207, 2003 SCC 43
3. *R. v. Van der Peet*, [1996] 2 S.C.R. 507

Legislation

4. *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 35
5. *Fisheries Act*, R.S.C. 1985, c. F-14
6. *Species At Risk Act*, S.C. 2002, c. 29
7. *Métis Nation British Columbia – Natural Resource Act*

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Your File:

October 17, 2011

COHEN COMMISSION OF INQUIRY INTO THE DECLINE
OF SOCKEYE SALMON IN THE FRASER RIVER

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650 West Georgia Street
Vancouver, British Columbia
V6B 4N7

Via e-mail to bwallace@cohencommission.ca

Attention: Commission Counsel – Brian J. Wallace, Q.C.

Dear Sir:

Re: Métis Nation British Columbia – Recommendations

I attach Submissions and Recommendations of the Métis Nation British Columbia pursuant to your direction for submission to the Commission.

In addition, I attach a List of Authorities referred to in the above noted Submissions and Recommendations together with the electronic copy of the case law referenced in the

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Joseph Gereluk & Co.

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October 17, 2011

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OF SOCKEYE SALMON IN THE FRASER RIVER**

Suite 2800, P.O. Box 11530
650 West Georgia Street
Vancouver, British Columbia
V6B 4N7

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7. *Métis Nation British Columbia – Natural Resource Act*